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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Cosmos Exploration Company,
Appellant,
vs.
Argyle Eagle Oil Company, Green-Whittier Oil Company, Mount Diablo Oil Mining and Development Company *et al.*,
Appellees.
No. 317.

Also

Pacific Land and Improvement Company,
Appellant,
vs.
Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern Oil Company, and Black Jack Oil Company,
Appellees.
No. 318.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief and Argument for Appellants.

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In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1902.

Cosmos Exploration Company, *Appellant,* *vs.* **Gray Eagle Oil Company, Green-Whittier Oil Company, Mount Diablo Oil, Mining and Development Company** *et al.,* *Appellees.*	**No. 217.**

Also

Pacific Land and Improvement Company, *Appellant,* *vs.* **Elwood Oil Company, Bakersfield and Fresno Oil Company, Kern Oil Company, and Black Jack Oil Company,** *Appellees.*	**No. 218.**

STATEMENT.

One fundamental question, common to both these cases, raised by the decision of the Circuit Court of Appeals, is no less radical and startling than this, viz:

May the settled and uniform interpretation and use from colonial days to 1901, of a word strictly technical in public land legislation of Congress and of the States, in decisions of the Courts and in the practice of the Land Department, be disregarded and a different one substituted by an administrative officer, to the prejudice of rights acquired under an Act of Congress after such rights accrued?

That question relates to the meaning of the term "Vacant Land" in the Act of June 4, 1897 (30 Stat. 36), under which Appellant's rights arise.

A second fundamental question common to both these cases, raised only, however, by the decision of the Circuit Court, is this:

Can a selector, under the Act of June 4, 1897, who has accepted and fully complied with the Government's offer of exchange contained in such Act, and who has conveyed to the Government—by recorded deed—his patented land in a Forest Reserve and selected in exchange therefor a similar area of public land—which was vacant land open to settlement, not known to be mineral at the time of selection,—have his rights in the selected land impaired or defeated by the subsequent discovery of mineral therein?

These cases came by appeal from final judgments of the United States Circuit Court of Appeals, Ninth Circuit, on appellees' demurrer to appellants' bills for injunctions, for appointment of receivers over, and to

quiet title to, certain valuable oil lands near Bakersfield, California. The suits originated in the United States Circuit Court for the Southern District of California, where demurrers filed to the bills were sustained and the bills were dismissed. On appeal, these judgments were affirmed.

The bills were framed alike, and are based upon the forest reserve lieu land act of June 4, 1897, [30 U. S. Stat., 36], which, so far as here material, provides:

That in cases in which a tract covered by * * * a patent is included in the limits of a public forest reservation, the owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of *vacant land open to settlement* not exceeding in area the tract covered by his * * * patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected.

Note—Numeral references, Arabic figures are to record 217; italics to 218.

The Bill (3: *4*) after the formal parts, in substance alleges that:

Complainant is equitable owner (4: 5) of the land in controversy; (5: 5) recites the statute; alleges that its predecessor in interest was owner in fee of certain described non-mineral patented land in a forest reserve; (5 & 6: 5) that the land in controversy was then vacant public land, open to settlement, containing no known minerals, petroleum, or salines, was returned by the surveyor, and on the land office records was characterized as agricultural land, subject to entry, at the United States Land Office at Visalia, California, and was equal in area to that first described; (5&7; 6) its predecessor in interest, owner of the patented land in a public forest reserve relinquished the first-men-

tioned tract to the United States pursuant to said act and filed with the register and receiver of said Visalia Land Office his duly recorded deed, with a full and correct abstract of the title to such land, duly certified by the proper county recorder, showing him at the date of recording his relinquishment to have been owner and holder of good unincumbered title to such land; and therewith also filed his selection of the land in controversy in lieu of that relinquished, and his affidavit that the land selected was non-mineral; (6 & 7: 7) the register and receiver accepted and filed such papers, entered such selection on their records and certified that the land selected was free from conflict, with no adverse filing, entry or claim thereto; whereupon and whereby complete equitable title to such land selected vested by such exchange, and the selector was entitled to receive patent thereto, and to quiet, peaceable, uninterrupted and exclusive possession thereof, and (9: 7) that he conveyed such land by deed to complainant, who is owner and entitled to patent and possession.

That (10: 7) defendants controvert complainants' title and right, and claim title themselves, basing their claim upon the location of an oil placer claim prior in date to the forementioned forest lieu land selection, which placer locators conveyed their claims to defendants, but (11: 8) said oil placer locations were invalid, (1) because no discovery of mineral oil had been made on such land as bases for such placer locations, and no discovery was made until after the forest reserve lieu selection; (2), (10:8) the placer locations were invalid because several, or numerous claims were located by the same persons so that each person attempted thereby to secure more than 20 acres each in violation of the spirit and letter of the mining laws; (3) the locations in case 217, on west half of section 30, were invalid for the further reasons (10: 12) that eight locators

in each of the two claims included more than 160 acres, viz., a fraction over 165 acres, a greater amount than allowed by law; and (4) because the numerical description of the lots was incorrectly stated.

After the forest lieu selections were made, (12: 9) the mineral placer locators and claimants filed in the local land office written verified protests against the selections alleging that the land was not subject to selection under the act of June 4, 1897, because it was then mineral land included in such placer locations and prayed a hearing be ordered as to the mineral character of the land, but the protests (13: 9) do not show or allege discovery of oil or other mineral, or that such was known to exist in paying quantities on the land prior to the lieu selections, and they are therefore insufficient in law to authorize an order for a hearing, or to impair or affect the selections; nor do they allege an interest in these defendants. These protests are still pending, and no hearing has been ordered.

14: *10.* Though the selector became complete equitable owner of the land, entitled to quiet, exclusive possession of it, and conveyed that interest to complainant, who now has it, defendants, after such selection was made, without right and with knowledge of complainant's right, wrongfully, without complainant's knowledge or consent, entered on the land, set up machinery, bored wells, drove pipes and discovered oil in profitable quantities, and are extracting and selling it in great quantities, to their own use, to the great waste of the land, and to complainant's great and irreparable injury, cloud and slander complainant's title and right, so that it cannot dispose of it, exclude complainant and its employees from the land, and threaten them with violence, and will execute such threats if they seek to enter upon the land to

obtain information concerning such wrongs, and complainant has no remedy at law.

15: *11*. The local sympathy is with these wrongdoers to the extent that they have notified claimant that no law exists which can dispossess themselves and that death and bloodshed will follow before any decree to that effect can be executed, and that an injunction against the continuance of these wrongful acts, and the appointment of a receiver over the property to take charge of it and preserve it pending suit is necessary to the enforcement of an injunction if granted, and to preservation of complainant's rights, and of the evidence of them.

Prayer 16: *12*, for temporary injunction pending suit, final perpetual injunction and for receiver over the property, and for a decree quieting complainant's equitable title.

Demurrers 21 to 25: *15-16* were for want of jurisdiction of subject matter: cause of action not stated: multifariousness: that complainant is entitled to no relief on the facts stated.

Demurrers 26: *17* were sustained, injunction and receivers denied by the Circuit Court, and the Decree 27: *17* dismissed the bill, on the ground that equitable title does not vest in a selector under the act of June 4, 1897, until final approval of selection by the land department, and that mineral discoveries made after such selections were made, defeated the selector's title.

Appeals were taken to the Circuit Court of Appeals, which (87: *45*) affirmed the decree, on the ground that "vacant land," as used in the act of June 4, 1897, means "*unoccupied*" land, and that the bill does not show the selected land to have been unoccupied when selected—Gilbert, Circuit Judge, dissenting 83: and the cases come by appeal to this court.

The appeals are solely from the decree overruling

the demurrers and dismissing the complaint. No appeal was taken from the judgment denying temporary injunction, or denying appointment of receiver, but the Circuit Court, nevertheless, compelled appellants to bring to the Circuit Court of Appeals the elaborate record on the applications for injunction and receiver, although such record had no bearing on the appeal taken, which rests solely upon the case as made by complainant's bill and the demurrers thereto.

In the Circuit Court of Appeals appellants declined to print this additional record in case 217; and in case No. 218 the additional record was printed, and appellants have brought this additional record here, but declined to print it here, because it not only had no bearing upon the questions presented by the appeal, but such practice has been frequently condemned by this court, as tending to obscure the issues, and as unnecessarily increasing the labors of the court.

This additional record, however, has been printed by appellees, and they will doubtless attempt to inject it into this controversy for some purpose.

THE LEGAL CONTENTIONS OF THE PARTIES STATED.

Complainants claim that a selection of public "vacant land open to settlement" under the Forest Reserve Lieu Land Act of June 4, 1897 [30 Stat., 36], in exchange for a similar area of patented land in a forest reservation deeded to the government, operates instantly as an acceptance of, and a full compliance with, the terms of the offer of exchange contained in such act, and thereupon the exchange is fully consummated, and the complete equitable title to the selected land vests *co instanti* in the selector, and that such equitable title can not be affected or impaired by a subse-

quent discovery of mineral on the selected land. That the land department, after such a selection is made, may inquire into and determine as to whether or not the land selected was under the law subject to selection *when selected,* but that such inquiry, when made, is confined to the *known* character and condition of the land selected *at the date of selection,* and can not take into consideration any *subsequent* discoveries of mineral made thereon. That public land is "vacant land open to settlement," and hence subject to selection under the act in question—in lieu of land in a forest reserve conveyed to the government—whenever (1) the same is not taken, appropriated or reserved on the books of the United States Local Land Office, and (2) whenever it is not *known* to contain valuable mineral deposits; but that the mere staking off of mineral claims and the occupancy of mineral claimants prior to the discovery of mineral on such claims do not prevent such lands being "vacant lands open to settlement." And complainants hold that a selector of forest reserve lieu lands who has acquired equitable title thereto can maintain in the Federal Courts of Equity a suit to prevent exploitation of such lands for their mineral, and prevent the removal thereof when found, until such time as the legal title thereto may issue or be determined by the land department.

On the other hand, defendants claim (1) that the equitable title to lands selected under the act of June 4, 1897, in lieu of patented lands in a forest reserve conveyed to the government, does not vest in a selector until such selection is finally approved by the land department, and that the discovery of valuable mineral deposits on such selected land after its selection, and at any time before such final approval thereof by the department, will defeat the selector's title; and (2) that land is not "*vacant,*" and therefore not subject to

selection under such act, if it has been staked off or located as a mining claim, or is occupied by mineral claimants, even though no discovery of mineral has been made thereon, and (3) that the land must not only be in fact unoccupied when selected under such act, but it must be shown to be so by an affidavit filed in the land office at the time the selection is made, and that until such affidavit is filed the equitable title to the selected land does not vest in the selector.

THE LEGAL POSITION OF THE CIRCUIT COURT AND THE CIRCUIT COURT OF APPEALS IN THESE CASES.

The Circuit Court did not pass upon defendants' second and third points above stated, but—although holding it was without jurisdiction—held with the defendants on their first claim, that the equitable title to lands selected under the act in question, does not vest in a selector until final approval of his selection by the land department, and that the discovery of valuable mineral deposits on such selected land after its selection, and before final approval thereof, will defeat the selector's title. *See foot note below.

The Circuit Court of Appeals, in these cases, held with the complainants on this phase of the controversy —although the erroneous syllabus of the case, as published in 112 Fed. Rep. would lead one to think other-

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NOTE: The same court, however, seventy-five days before, (in Olive L. & D. Co. v. Olmstead, 103 Fed. 568), held exactly the reverse, and sustained EVERY proposition of law for which the complainants are here contending; at the beginning of this brief we call the Court's special attention to this case, as a stronger brief for complainants could hardly be presented than is there furnished by the Circuit Court's opinion. Later in this brief, pages to , we analyze this case and the Circuit Court's reasons given in the present cases for reaching different conclusions here.

wise. And the department of the interior in the recent case of Kern Oil Company v. Clarke, 30 L. D., 550, has directly sustained complainant's contention on this question. But the department, in the last named case, has held that the word "vacant" in the act of June 4, 1897, means "*unoccupied*," and that land must be actually unoccupied to be subject to selection under such act, and must also be shown by the selector to be unoccupied, by an affidavit to that effect, filed in the land office, and that until such affidavit is filed, the equitable title to the selected land does not vest in the selector. This view is sustained and adopted by the Circuit Court of Appeals in these cases, with this slight qualification only, namely: The department holds that a mere *de facto* occupancy of public lands "by one having no thought of acquiring title," prevents the same being in law "vacant," while the Circuit Court of Appeals only holds that lands staked off as mineral claims and occupied by mineral claimants, even before discovery of mineral thereon, is not "vacant," and therefore is not subject to selection under the act of June 4, 1897.

We will in this brief examine the questions involved, in the following order:

1st. Our position that equitable title to lands selected under the act of June 4, 1897,—in exchange for patented land in a forest reserve relinquished to the government—vests in the selector at the date of selection, and cannot be impaired by subsequent mineral discovery in the land.

2nd. The Circuit Court of Appeals' opinion that the staking off of mineral claims, and the occupancy of mineral claimants, before the discovery of mineral, prevents land being "vacant" or "open to settlement."

3rd. The meaning of the word "vacant" in the act

of June 4, 1897, as fixed by legislative, executive and judicial use and construction.

4th. The necessity of filing a non-occupancy affidavit in the land office before equitable title can vest in a selector under the act of June 4, 1897.

5th. Review of the case of Olive L. & D. Co. v. Olmstead, 103 Fed. 568.

6th. The Circuit Court's opinion that equitable title does not vest in a selector under the act of June 4, 1897, until approval of selection by the land department, and that mineral discoveries made after selection, will defeat such selections.

7th. An examination of the supplemental record printed by appellees herein, containing the affidavits used on application for temporary injunction in the Circuit Court.

8th. The jurisdiction of the Federal Equity Courts by injunction and receiver to prevent wastes and spoilation of lands, and to preserve the *status quo*, at the instance of a party claiming the equitable title, pending the determination of the title, or issuance of legal title by the land department.

The case is peculiar, in that, while the Circuit Court held it was without jurisdiction of the subject matter, it proceeded to consider and find upon the merits. Ordinarily a court finding want of jurisdiction of the subject matter proceeds no further, and declines to consider, or to intimate an opinion upon, the merits. The case is exceptional in that, in an opinion fully discussing the merits upon the facts admitted by the demurrer, after deciding it had no jurisdiction, the court announces an opinion on the merits, thus declaring how it will decide the case if this court holds it had jurisdiction.

If, therefore, this court holds there was jurisdiction, it must consider the opinion upon the merits and cor-

rect errors therein, for it would be a travesty upon justice, if an erroneous interpretation of the act of June 4, 1897, appears, in an opinion upon the merits, to send complainants back to that court, merely to have the same error reannounced and again—after delay and expense of futile proceedings—appeal here for correction of the same error.

The erroneous interpretation of the act of June 4, 1897, is the false premise upon which the Circuit Court's conclusion of want of jurisdiction of the subject matter was based. The judgment is not merely founded upon, but is, in its entirety, made up of, the erroneous construction of the act of June 4, 1897, so that it is inseparable from it and cannot be discussed separately from it.

ASSIGNMENT OF ERRORS.

The assignments of errors, 83-89; *46-7*, present three general questions and assign errors in the judgment, which, grouped, are:

1st. Assignments 1 & 2—Error in denying jurisdiction, *a*, to try title or right of possession of the lands; or, *b*, to protect from waste complainant's equitable estate in the lands, and to preserve the *status quo* by injunction and appointment of receivers.

2nd. Assignments 3 to 11, errors as to the character and class of lands offered by the act of June 4, 1897, in exchange for private lands within forest reservations, viz: that "Vacant lands open to settlement" *are lands not occupied by others*, and that mere occupancy of public lands without right thereto, excludes it from selection under the act.

3rd. Assignments 12 & 13, complainants' foregoing contentions being well founded, the court erred in sustaining the demurrers and dismissing the bill.

I.

The equitable title to lands selected under the Act of June 4, 1897, in exchange for patented land in a forest reserve relinquished to the government, vests in the selector at the date of selection, and cannot be impaired by subsequent mineral discoveries in the land.

The portion of the act of June 4, 1897 [30 Statutes 36] applicable to this controversy, reads as follows:

"That in cases in which a tract covered by an unperfected *bona fide* claim, or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent, and no charge shall be made in such cases for making the entry of record, or issuing of the patent to cover the tract selected; and provided further, that in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claim."

Here the government offers inchoate title for inchoate title, and perfect title for perfect—or patented —title. In these cases, we have only to deal with *patented* lands relinquished to the government; that is, to perfect titles relinquished, in lieu of which perfect titles were obtained.

We maintain that this act constitutes a standing offer on the part of the government to exchange any of its "vacant land open to settlement" for a similar area of patented land in a forest reservation; and that whenever a person relinquishes to the government a tract of forest reserve land, and places his deed to the gov-

ernment of record, as required by the land office rules, and selects in lieu thereof a similar area of "vacant land open to settlement;" that such offer of the government has been thereby both accepted and fully complied with; and that the complete equitable title to the selected land is thereby vested in the selector.

The grantors of the complainants in these cases, having done this, the selector's title became valid and unquestioned. The land was no longer vacant, nor open to settlement. It was not thereafter subject to mineral exploration, any more than it was to homestead settlement. The title of the selector's land vested in the government by deed duly recorded; the government's title to such relinquished land was thus complete, and if oil had immediately thereafter been found in paying quantities on the land so conveyed to the government, the selector had no power under the law to recall his deed and get it off the record, nor was anyone empowered to reconvey for the government.

By every principle of mutuality, the same rule applies to the government. The recording of the deed of the relinquished land and the selection of "vacant land open to settlement," left nothing remaining to be done. The issuance of the patent is not the exchange; it is only evidence of such exchange. The exchange was complete, and therefore a court of equity should protect complainant's property and right of possession by injunction.

The bill alleges that *after* complainant's title had been so acquired, the defendants, by trespass, entered upon the land and commenced to drill for petroleum, and subsequently found the same, and that the defendants are engaged in removing the same. These facts, which are all admitted by the demurrers, make a clear case for equitable relief.

We call the court's attention to Rule 16 of the Reg-

ulations of the Land Department, under the act of June 4, 1897, which reads as follows:

"16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quit-claim deed to the United States, have the same recorded on the County Records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed, as required by paragraph 15, without the affidavit therein called for."

See page 18, Regulations of Land Department, concerning creation and administration of Public Forest Reserves, issued November 6, 1900.

It will be thus seen that the department requires one having a perfect title to lands in a forest reserve, to divest himself of such title by a relinquishment placed of record in the county recorder's office, before he is permitted to make his selection of lands in lieu thereof. The placing of the selector's deed of record thus vests the title in the United States, beyond the selector's power of recall, and it is only by an act of Congress that such title can be re-obtained.

The situation, therefore, presents a case in which a selector is required to part absolutely with the entire consideration for the selected land—that is, to pay in advance the full purchase or exchange price—with no power of recovery, before he can be allowed to make a selection in lieu thereof.

It is a well established doctrine of the law of sales and exchanges, that when an offer has been accepted and the purchase or exchange price fully paid, and the terms of the offer otherwise complied with, that the equitable title to the property in question has passed.

Such was held to be the effect of the very act here under consideration by the Circuit Court for the Ninth

Circuit, in the case of Olive Land & Development Company vs. Olmstead, 103 Fed., 568, which we examine at some length elsewhere in this brief, and this statute has been so construed by the Land Department in the case of Gideon F. McDonald, 30 L. D., 124, Clarke v. Northern Pacific, 30 L. D., 145, and Kern Oil Co. v. Clarke, 30 L. D., 550.

In the McDonald case, *supra*, the question arose in response to the request for instructions asked of the Secretary of the Interior by the Commissioner of the General Land Office. The facts there, were, that a selection of land had been properly made by McDonald, under the Forest Reserve Lieu Land Act, but before action was taken upon the selection by the land department—that is, before it was *approved* by the commissioner—the lands relinquished to the government as a basis of selection were, by proclamation of the president, excluded from the boundaries of the forest reserve. The question arose as to whether, in view of this fact, the selection would still be approved by the department, and upon this subject Secretary Hitchcock says:

"When the selection was filed, the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of a forest reservation, and a proper basis for selection under said act, and the land selected by McDonald in exchange therefore was, according to the records of your office, of the character subject to such selection, and free from any other claim or appropriation. *By his deed of relinquishment and reconveyance to the United States of his own lands, situated within the boundaries of a forest reservation, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the Government contained in the Act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the exe-*

cution of which, by the government, he had a vested right. After McDonald had fully complied with the terms on which the government by its act had declared its willingness to be bound, no act of either the executive or legislative branch of the government, could divest him of the right thereby acquired. Your office will therefore carefully examine the papers and records pertaining to this selection, and if it is found to be otherwise free from objections, the fact of the elimination from the boundaries of the forest reservation of the lands in lieu of which the selection is made, after full compliance by complainant with the lieu land act and regulations, will not prevent approval of the selection."

It will thus be seen that the department holds that the relinquishment of forest reserve lands, and the selection of vacant land open to settlement, constitutes a "contract fully executed" upon the part of the selector at the instant of the selection. The fact that the land was not eligible for relinquishment, at the date of *approval* of selection, was held to be immaterial, if the same was eligible *at the date the selection was made*, as it was *at that date* the transaction became a "contract fully executed" upon the part of the selector.

In the case of Clarke v. Northern Pacific, *supra*, the above language from the McDonald case is quoted with approval. In that case the land was selected under the Forest Reserve Lieu Land Act, but prior to approval thereof by the Commissioner of the General Land Office, an order was made withdrawing the selected land from settlement, sale or other disposal, until it was finally determined whether or not they should be reserved for forest purposes. The question the department was called upon to decide was as to whether or not such withdrawal or attempted withdrawal could affect Clarke's selection of the land already made, but not yet approved. After quoting the extract from the

McDonald case above given, the decision proceeds as follows:

"The same principles announced in the case of McDonald apply in the case at bar. *If the land selected by Clarke was subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deeds of relinquishment and deed of conveyance were proper bases for his selection, he acquired, at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands.* The lands embraced in his selections were therefore not subject to the said withdrawal, having been previously appropriated and segregated from the other public lands in said township, by such selection."

To the same effect, as to the date of the vesting of equitable title, see case of Kern Oil Co. v. Clarke, *supra*, [30 L. D. 550] and the numerous cases there cited, pages 556 to 564, where the question is elaborately discussed by the Secretary of the Interior.

The doctrine and controlling principle governing these cases was clearly stated by this court in the case of Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S., 128; that was a case in which it was sought to defeat the title of a mining claimant to his mine, after he had paid the complete purchase price therefor, but before patent issued, by showing that he had not complied with the terms of the United States Statutes, which required that not less than one hundred dollars' worth of labor be performed, or improvements made each year, "until a patent has been issued therefor."

It was shown in that case that more than a year elapsed between the date of payment to the government of the purchase price of the mine and the issuance of patent, and that during such period the required amount of one hundred dollars' worth of labor or im-

provements was not made upon the property; but notwithstanding the positive language of the statute, making it necessary to do one hundred dollars' worth of work each year, "until a patent has been issued," this court held that:

"When the price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of business in the land department causes delay, but such delay in the administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third persons. * * * It is a general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government, and the ruling has been uniform that whenever in cash sales the price has been paid, or *in other cases, all the conditions of entry performed, the full equitable title has passed*, and only the naked, legal title remains in the government, in trust for the other party, in whom is vested all the rights and obligations of ownership. * * * Lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. * * * In French v. Spencer, 62 U. S. 228, it appeared that a military land warrant had been located on the tract, and the land sold thereafter, but before the issue of the patent. The act under which the land warrants were granted provided that no claim for military bounties should be assignable or transferable, *until after the patent had been issued*, and that all sales or mortgages, or contracts made prior thereto should be void. In that respect it will be seen that the language is not dissimilar to that used in the section before us in the present case. It was held that the patent related

back to the time of the location, and that the conveyance intermediate the location, and the patent was valid, and transferred the title. * * * The right to a patent once vested, is treated by the government, when dealing with the public lands, as equivalent to a patent issued; when in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants. * * * In Worth v. Branson, 98 U. S., 118, it was held that a party who had complied with all the terms and conditions which entitled him to a patent for a particular tract of land, acquires a vested interest therein, and is to be regarded as the equitable owner thereof." In concluding the discussion of this phase of the case, the court says: "There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him."

To the same effect see:

Simmons v. Wagner, 101 U. S. 261;
United States v. Hughes, 11 Howard, 568;
Stark v. Starrs, 6 Wallace, 414;
Worth v. Branson, 98 U. S., 118;
Carroll v. Safford, 3 Howard, 414;
Witherspoon v. Duncan, 4 Wallace, 210;
Deffeback v. Hawke, 115 U. S. 392;
Colorado Coal & Iron Co. v. U. S., 123 U. S. 307;
Davis v. Wiebold, 139 U. S. 524.

Selections made under the Act of June 4, 1897, in lieu of patented lands relinquished to the government, cannot be affected or impaired by subsequent mineral discoveries upon the selected land.

It is the *known* character and condition of the selected land *at the date of selection* that determines the right of the selector therein, and no subsequent changes in the character or condition of such land can affect the selectors' title. The best of all reasons, and the one which, in itself is sufficient for holding that it is the *known character* of the land selected under the Forest Lieu Land act, *at the date of selection* that must control the right of the selector thereto, is that the selector is called upon *at such time* to determine whether or not he will make the exchange offered to him by the statute, and it would be altogether unreasonable and unfair to him—after he had conveyed his forest reserve land to the government and selected the land he wanted in exchange—to make his title to the selected lands depend upon the results of subsequent mineral developments thereon—he having been compelled already, by the land office regulations, to part with his title to the forest reserve lands—the full consideration for the exchange and the entire purchase price therefor—and to vest the same in the government.

This reason cannot be more strongly stated than was stated by Judge Ross in the case of Olive L. & D. Co. v. Olmstead, *supra*, where he used the following language in referring to this very act:

"In all cases, the land authorized to be selected in lieu of that relinquished, is required to be vacant and open to settlement. When? *Manifestly, at the date of selection. It is upon its then character and condition that the selector has the right and is bound to act.*

Before making his selection, he must inform himself of the character and condition of the tract desired; *but it would be wholly unreasonable to say that he is required to make his selection based upon what may be disclosed in that regard in the future.*"

And it must be apparent that as the purpose of the Forest Reserve Lieu Land Act is to eliminate private holdings from Forest Reserves that this purpose would be wholly defeated, if the selector of such lands, under such act, could not *know at the time he selected his lieu lands* as to whether or not they were *then* subject to selection; as he certainly could not be expected to surrender his title to the Forest Reserve land to the government—which he could only get back by a special act of Congress—and to select other land in lieu thereof, if his title to the lieu lands could be defeated by conditions transpiring subsequent to the selection, over which he had no control.

Relinquishments and selections under the act of June 4, 1897, are optional with the party making them. His act of relinquishment would be guided and influenced and generally controlled by what land he would be able to get for that relinquishment. If he can get a given tract of land today vacant and today understood and rightly understood to be non-mineral—no mineral having been discovered thereon, and not being returned as mineral—he is willing to make his relinquishment, and to take it, but unless he is able to get *that tract* of land, he is entirely unwilling to relinquish his tract in the Forest Reservation; and he is entitled to rely upon the state of things existing *at the time he is called upon to act* upon the government's offer contained in the Forest Lieu Land Act. If the land selected is *then* subject to selection, why should his right to it be affected by anything which subsequently occurs to such land, as the subsequent dis-

covery of mineral thereon? The act in question should be liberally construed in order to accomplish the ends intended by it. The act is not a public gratuity nor a grant by way of gift to a private corporation, as in case of grants to a railroad company, but, on the contrary, is an act of a two-fold character in which (1) the government—to conserve the general good—is seeking by exchange to acquire title to certain lands which *it wants*, so as to thereby render its control of forest reserves more effective in preserving the timber and the watersheds, and in increasing and conserving the rainfalls in the arid regions, and (2) it is an act of plain justice to individuals, in offering an exchange of lands to certain persons in order to reimburse them for an injury done to their property by the government in including the same in a public forest reservation, thus depriving such owners of the right of roads, schools, churches, markets, neighbors and other essential elements of civilization, and must, insofar as its provisions confer rights for rights relinquished be construed liberally in favor of the selectors so as to accomplish the government's purpose.

The purpose of the selector in making his selection is immaterial.

The right of the owner of patented lands in a Forest Reserve to select any lands he may choose in lieu of the lands relinquished by him to the government is only restricted in this: that the land selected must be *at the date of selection "vacant land open to settlement;"* the meaning of "vacant land open to settlement" we discuss elsewhere.

Therefore, the *purpose* of a selector in making a selection is wholly and absolutely immaterial, as is also the use he expects to make of the land, after acquir-

ing title. If the land is such as the act states may be selected, viz: "vacant land open to settlement," it is his right to select it, without being compelled to answer either to the government, the land department or to any person whatsoever as to what use he expects to make of the land, after it is selected. The act does not say either expressly, or by the remotest inference that the land must be selected for the purpose of agriculture or grazing, or any other purpose; therefore, if the selector finds a tract of land, which is "vacant land open to settlement," he may select it, having no intention whatever of using it for agriculture; indeed he may be of the opinion that it is wholly unfit for such purpose, and may intend to use it, after acquiring title, either for a race-track, a mill-site, a lumber yard, a hunting ground, a baseball or tennis ground, or he may select it with a view of obtaining title and then leasing it to a near-by city or town for exposition grounds, or, finally, he may select it with the *sole* purpose in view of tunneling for a mine of silver or gold, or boring for petroleum, or any other purpose whatever which he may choose, to the same extent and as unrestrictedly as *any owner* of land may do with his *own property*. In other words, the *use* of the land selected must be, and by the act was intended to be, as unrestricted as was the use of the patented land relinquished. The act simply says that a selector can take any land, with certain specified exceptions, but it does not state that he must either use, or must intend to use, or that before selecting it, must make affidavit that he intends, after acquiring title, to use—the selected land in any particular way, or for any particular purpose whatsoever; and it is respectfully submitted, that if any rule or regulation of the land department makes any such requirement on the part of the selector as a condition precedent to the issuance of the patent, it is *unau-*

thorized by the act, and must be held to be in operative as in anywise affecting the rights of the selector.

That the selector's purpose in making the selection has nothing to do with his right of selection, was distinctly decided in Olive L. & D. Co. v. Olmstead, 103 Fed., 568.

The same principle was clearly and emphatically announced by this court in the case of Iron & Silver Mining Co. v. Reynolds, 124 U. S., 374, where it is held that the fact that a placer patent was obtained with the *intention of acquiring title to lodes supposed to exist* within a placer claim, but not as yet discovered, would not defeat the title to the placer claim. In that case, the court makes it clear that the rights of the parties are fixed by the *known character of the land at the time the title vested*, and not by any *intent* or *purpose* of the party acquiring the title.

See also to the same effect:

Sullivan v. I. S. & M. Co., 142 U. S., 431.

Mineral discovery after sale cannot affect purchasers' title.

We submit that the authorities hold that land is "open to settlement," unless it contains *known* valuable mineral deposits, and that title under the settlement laws vest at the date of sale, or at the date when the settler has fully complied with the law, and cannot be impaired by subsequent discoveries of mineral therein, even before the patent issues.

The leading case on this subject is:

Colorado Coal & Iron Co. v. United States, 123 U. S., 207,

in which it is held that lands are subject to the operation of the pre-emption and homestead laws, unless

they contain "*known* mines," capable of being profitably worked for their product, so as to make them more valuable for mining than agricultural purposes at the time they were acquired. The court says, in concluding the discussion of the case:

"The question must be determined, according to the facts in existence *at the time of the sale,* if, upon the premises, at that time there were no actual '*known* mines' capable of being profitably worked for their product, so as to make the lands more valuable for mining than agriculture, the title to them acquired under the pre-emption act cannot be successfully assailed."

And it is further said:

"It will thus be seen that so far as the decisions of this court have heretofore gone, no lands have been held to contain known mines, *unless at the time the rights of the purchaser accrued,* there was upon the ground an *actual and open mine,* which has been worked or was capable of being worked."

The case is also authority for holding that lands are not reserved from pre-emption sale, unless they contain a known mine *at the time the purchase price was paid.* In that connection, the court says:

"We hold, therefore, that to constitute the exemption contemplated by the pre-emption act, under the heading of 'known mines,' there should be upon the land *ascertained* coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine under the conditions existing at the time, than for mere agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal, does not constitute a mine; it does not prove that the land will be, under any conditions sufficiently valuable, on account of its coal deposits, to be worked as a mine. *A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title, as it passed at the time of the sale. The question must*

be determined according to the facts in existence at the time of the sale."

This is one of the strongest authorities in the books in support of our position, that subsequent developments and production of mineral, after the claimant's title vests cannot impair such title. The above language from the Colorado Coal Company case, is quoted with approval in the case of Davis v. Wiebold, 139 U. S., 507.

The case has an important bearing upon this controversy in two respects: It holds: (1) that the only lands which are not open to settlement, under the settlement laws, are those containing *known* salines or mines; and (2) that such salines or mines *must be known prior to and and at the date of the sale*, and therefore, mines discovered subsequently to the date of the sale cannot affect the title of the purchaser.

To the same effect see:

Deffeback v. Hawke, 115 U. S., 392.

In the recent case of Baca Float No. 3, 29 L. D. 45-52, the Secretary of the Interior had under consideration an Act of Congress very similar to the Forest Reserve Lieu Land Act, the granting words in which act are as follows:

"It shall be lawful for the heirs of Maria Baca * * * to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number."

On former occasions, when construing this act, the department has held that title passed upon the *approval* of survey, and not *at the time of selection*, but the case having come before this court in Shaw v. Kellogg, 170 U. S. 312, and this court having held that the title passed *upon selection* of the lieu land, and not upon some subsequent date, the department adopted such

decision as the law of the case, and treating the subject, uses the following language:

"In the case of Shaw v. Kellogg, *supra*, the Supreme Court had under consideration selection No. 4 of the series authorized by said Act of June 21, 1860, and in the discussion of the questions there presented it was said (page 332):

"The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then *known* to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say '*lands then known to contain mineral,' for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral.* The selection was to be made within three years. *The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries.*'

"Under the authority of that case, it would seem clear, that *the time with reference to which the character of the land is to be determined, is the date of the selection*, and not the date of approval of the survey of the claim, as formerly held by the department, and nothing further need be said here on that subject."

This court, in Shaw v. Kellogg, immediately following the extract from the opinion quoted by the secretary above, says:

"This is in accord with the general rule as to the transfer of the title to public lands of the United States. In cases of homestead, pre-emption or townsite entries, the law excludes mineral lands, but it was

never doubted that the title once passed, was free from all conditions of subsequent discoveries."

This is no new doctrine, but it is in full accord with the settled weight of authority. The Court's special attention is directed to the following cases sustaining this rule, that when the purchase price has been fully paid, or the provisions of the statute for the acquiring of title otherwise complied with, that the full equitable title thereby vests, and that no subsequently transpiring event can impair such title.

See Lariviere v. Madegan, 1 Dillon, 457; 14 Fed. Cases, case No. 8096;

Culver v. Uthe, 133 U. S., 655.

In McNee v. Donahue, 76 Cal., 504, referring to selections of land by the State of California, under the Act of Congress of 1866, to quiet land titles in that State, the Supreme Court of California says:

"Nor does it make any difference that the Commissioner of the General Land Office on receiving the notices (of selection) above mentioned from the various registers, if he finds them to be in accordance with section 1 of this act, is directed to certify them over to the state in the usual manner. This merely furnishes record evidence of the selection and identification, *and this purpose is not at all affected by the fact that the land officers are to first investigate whether the selections come within the purview of the act.* Even if a patent had been required to be issued, it would not have operated to *transfer* the title, which had already passed."

In Michigan Land & Lumber Co. v. Rust, 168 U. S., 594, this court, while holding generally that so long as the legal title remains in the United States, and the grant is in process of determination by the land department, that the land is subject to the jurisdiction of such department, uses the following language:

"It is of course not pretended that when the equitable title *has passed*, the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after the proper notice to the party claiming such equitable title, upon a hearing, to determine the question, whether or not such title has passed."

This is a crystallized statement of our position in this case. We contend that equitable passed at the date of "selection," if the lands "selected" were *then* subject to "selection," but that the department may, in some proper manner, inquire into this question, and find out whether or not the selected lands were *then* subject to selection. This inquiry and examination on the part of the department, however, does not postpone the date of the vesting of the equitable title. If the selector accepted and complied with the offer, the exchange instantly became complete. The department is limited in its inquiry to one question—was the exchange made as authorized by the statute? If so, the selection must be passed to patent.

In Cornelius v. Kessel, 128 U. S. 426, this court said; in referring to the supervisory power of the land department over the public lands:

"But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry is made upon false testimony or without the authority of law. *It cannot be exercised so as to deprive any person of land lawfully entered and paid for; by such entry and payment, the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner, than he can be deprived by such order of any other lawfully acquired property.* Any attempted deprivation in such way of such property, will be corrected when the matter is presented so that the judiciary can act upon it."

See also Wright v. Roseberry, 121 U. S., 488.

Where the decision of the lower court was reversed for the reason that it made "*the investure of the title depend upon the act of the commissioner, instead of the act of Congress*, whereas the certificate of that officer, if the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. * * * If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlement. They were not afterwards public lands at the disposal of the United States."

In the case of the United States v. Iron Silver Mining Co., 128 U. S., 673, it is held that discovery of a vein or lode after the date of sale to placer claimant, but before patent, would not affect the placer claimant's title. That was a case in which the patent had been granted a placer claimant, and it was shown that after application for such patent, and after the payment of the purchase price—but before patent issued—a vein or lode of gold-bearing quartz was discovered upon the property, and was actually being worked by the applicant. It was sought to set aside this patent, on the ground that the same was issued in violation of law, in that it included a valuable quartz lode or vein, under the guise of placer mining ground. The Court held, however, that as the quartz ledge was not discovered until after the applicant had applied for patent, and paid the purchase price, that the subsequent discovery of the quartz ledge did not divest the title which had passed to the applicant by virtue of his application for patent and payment of the purchase price.

The land office decisions all hold that a mineral discovery after sale or other full compliance with the law can not affect purchaser's title.

To the effect that the complete equitable title vests in homestead and pre-emption claimants whenever they have fully complied with the requirements of the statute to enable them to obtain title, and that no mineral discoveries occurring after such date can affect the title of the pre-emptioner or homesteader, the decisions of the Land Department are all uniform.

In Nicholas v. Abercrombie, 6 L. D., 393, it was held:

"That a change of conditions appearing after sale (pre-emption whereby new discoveries are made, cannot affect the title as it passed at the time of the sale."

To the same effect, see:

Harnish v. Wallace, 13 L. D., 108;
Abner L. Miner, 9 L. D., 408;
Thomas J. Laney, 9 L. D., 83;
Plymouth Lode, 12 L. D., 513;
Jones v. Driver, 15 L. D., 518;
James K. Jacks, 7 L. D., 570;
Ray v. Stevenson, 15 L. D., 37;
Reid v. Laverlee, 26 L. D., 100;
Carmichel v. Hiller, 26 L. D., 19;
Mary Ann Castle, 3 L. D., 169;
Arthur v. Earle, 21 L. D., 92;
Dufresne v. Mace, 30 L. D., 216;
Aspen Cons. M. Co. v. Williams, 27 L. D., 1;
Kern Oil Co. v. Clarke, 30 L. D., 550;
Harkrader v. Goldstein, 31 L. D., 87.

The Court's special attention is called to the three last named cases as containing an exhaustive review of

the authorities on this subject, both Departmental and Court.

To the effect that the State's title to the 10th and 36th Sections vest at the date of survey, when the location of the land becomes definite, if the land was not then "*known*" to be mineral, and that a subsequent discovery of the mineral character of such land will not divest the title of the State, which had already passed, see

State of California v. Pauly & Thomas, 4 C. L. O., 18;
Virginia Lode, 7 L. D., 459.

The settlement laws are only applicable here in order to determine *what lands* are subject to selection, and not to determine *the character of the right or title* acquired by selection.

In the Hyde case, 28 L. D. 284, 287, the Department in defining what lands were subject to selection under this act said:

"The only limitation as to the kind or condition of lands subject to lieu selection thereunder is contained in the words 'vacant land open to settlement.' This language is so clear and explicit as to leave no room for construction, 'vacant land open to settlement' is *any public land to which right may be initiated by settlement under existing laws.*"

This defines the *character of land* that may be selected, the McDonald & Clarke cases already quoted from define the *character of this right*, acquired by selection, and determine the *time when* the selection takes effect.

If the lands when selected were "vacant and open to settlement," the conditions fixing the right to select

were met and fulfilled; and after selection, the analogies between the rights acquired under the settlement laws by original entry and the rights acquired under forest lieu selections are no longer applicable; for admittedly, under the settlement laws, all rights are inchoate, incomplete and immature until the time of *final* entry, at which time everything has been done by the entryman that the law requires of him, and the right to patent has been fully earned and acquired.

The selection once being made under the Forest Lieu Land Act, *of land then subject to selection*, the analogies of the Valentine and Sioux scrip cases, and of the military bounty land warrant cases apply; for the reason that entries under such scrips, or under such land warrants, operate as immediate, completed, consummated purchases of the property, vesting the complete equitable title instantly in the entryman.

If this distinction is clearly borne in mind, all of the uncertainties as to the effect of subsequent discoveries will be eliminated from the cases, for admittedly, if these lands had been entered with Sioux scrip, or Valentine scrip, or military bounty warrants, and the same had been subject to entry at the date of entry, no subsequent change of conditions of any kind or character, could have affected or impaired the title acquired by such entries. This law merely requires that the land be "vacant and open to settlement" *at the date of the selection, not that it shall REMAIN SO until the final issuance of patent.*

The selection is in fact but a private cash entry of land offered for sale, and differs only from an ordinary cash entry or land warrant location in the character of the consideration, viz., *land paid, conveyed, in advance of the entry*, instead of money, land warrant or scrip, delivered *at the time of the entry*. This being so, it follows that the decisions relative to the vesting

of right at the time of a cash entry, warrant or scrip, location at the local land office are all applicable. Equitable title must vest when the selector at the local land office delivers his recorded deed and evidence of title to the land selected, and designates the land he wants in exchange. If the latter is *then* subject to entry and non-mineral, i. e., is then vacant and open to settlement, the equitable title must then vest

The *character* of the right acquired by the selection, is to be measured, not by the analogies of the settlement laws, but by the language of the statute, and its purpose and intent clearly was to enable a party to acquire title to land which he selected, *if at the time of selection, the same was subject to selection under the provisions of the statute.* This being done, his title was AT ONCE as good as if patent issued instantly.

Locations of scrip or military land warrants operate as immediate purchases.

See Lariviere v. Madigan, 1 Dillon, 457, 14 Fed. Cases, case No. 8596;
Allen v. Merrill, S. L. D., 207;
Case of E. C. Stimson, 15 L. D. 256;
French v. Spencer, 98 U. S., 118;
Culver v. Uthe, 133 U. S., 655;
See also Boca Float case, No. 329 L. D. 45-52;
Shaw v. Kellogg, 170 U. S. 312.

The meaning of "Vacant land open to settlement" as used in the Act of June 4, 1897.

As we discuss later in this brief at great length the meaning of this phrase "vacant land open to settlement," we will not take the Court's time at this place to do more than briefly state our claim as to the meaning of this language: We maintain that by long use in

the Legislation of Congress, and in the executive and judicial administration of the general land office and by the courts, the word "vacant" as applied to public lands, has acquired a thoroughly crystalized and established *technical* meaning and now refers solely to the condition of public lands, as disclosed by the land office records, and means *"Land not appropriated or reserved on the books of the Land Office." That is, vacant lands are lands open for entry on the land office books*, and we maintain, that the word "vacant," as used in this Statute has no reference whatever to the occupancy or non-occupancy of land, or to the condition existing on the land itself. We maintain, that "open to settlement," as used in this statute, refers to conditions existing on the land itself, and does not refer to the land office records, and that the expression "open to settlement" protects and excludes from selection under this statute all lands containing *known* valuable mineral deposits, at the date selection is made under this act. Any attempt to give to the word "vacant" the meaning of "unoccupied," and to confine the expression "open to settlement to conditions existing on the Land Office Records, as is done by the Secretary of the Interior in the Kern Oil Company case, *supra*, leaves entirely without protection all valid mining locations and all *known* valuable mineral lands, unless such lands and such locations are actually *occupied*, whereas occupancy of mineral land has never been held to be essential to the maintenance of mineral title.

Public land is subject to acquisition under the non-mineral land laws, although of insignificant agricultural value, and notwithstanding its location within close proximity to mineral-bearing lands, unless there has been an actual valuable discovery of mineral upon the specific land.

This position is sustained by a long and uniform line of decisions, both of the Department of the Interior, and of the United States Supreme Court. The leading case on the subject among the land department decisions is that of Dughi v. Harkins, 2 L. D. 721, which was decided by Secretary Teller in 1883. The case has been cited probably more than any other single case ever decided by the land department, and has been approved over and over again by the department down to the present date, and has also met with the sanction and endorsement of the United States Supreme Court in many different cases.

We refer the Court first to an extract from the opinion in that case, which is quoted with approval by Justice Field, in Davis v. Wiebold, 139 U. S., 507, where in commenting upon such decision, this court says:

"In Dughi v. Harkins, 2 L. D., 721, which was before the Interior Department in November, 1883, there was a contest between agricultural and mineral claimants of land having been returned as agricultural by the surveyor general. In disposing of it, the secretary, Mr. Teller, in a communication to the commissioner of the general land office, said: 'The burden of proof is therefore upon the mineral claimant, and he must show, not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter, by possibility, develop minerals in such quantity as will establish its mineral, rather than its agricultural character, but, that as a present fact it is mineral in char-

acter, and this must appear *from actual production of mineral, and not from any theory that it may produce it*. In other words, it is fact, and not theory, which must control your office in deciding upon the character of this class of land; nor is it sufficient that the mineral claimant shows that the land *is of little agricultural value*. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value.'"

Commenting upon this case later in the same opinion [In Davis v. Wiebold, *supra*], Justice Field says: 'In Cleghorn v. Bird, 4 L. D. 478, and in Kings County Commissioners v. Alexander, 5 L. D. 126, Mr. Secretary Lamar followed the decision of Secretary Teller in Dughi v. Harkins, and in repeated cases afterwards, it was not only referred to by him with approval, but also by his successor in the Department, Mr. Secretary Vilas.' Rulings to the same effect upon applications for mineral patents are found in the decisions of the department for many years. They are that such applications should not be granted, unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it, *is established as a present fact*. If mineral patents will not be issued unless the mineral exists in sufficient quantity to render the land more valuable for mining than for other purposes, *which can only be known by development or exploration, it should follow that the land may be patented for other purposes if that fact does not appear*."

"See to this purport the following decisions of the Interior Department:

Magalia Gold Mining Co. v. Ferguson, 6 L. D., 218;

Nicholas v. Abercrombie, 6 L. D., 393;

John Downs, 7 L. D. 771;

Cutting v. Renninghaus, 7 L. D. 265;

Cresswell Min. Co. v. Johnson, 8 L. D. 440;
Thos. J. Laney, 9 L. D. 83.

"It would seem from this uniform construction of that department of the government specially entrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the Courts of the mining states federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress, should be considered only to apply to such lands as were at the time of the grant *known* to be so valuable for their minerals as to justify expenditure for their extraction."

Proof that neighboring land contains oil in profitable quantities is not sufficient to defeat an entry as agricultural.

Roberts v. Jepson, 4 L. D. 60.

Where land is returned as agricultural, the burden of proof is on the mineral claimant to show the contrary and the proof must be specific and *based upon actual production of mineral upon the land involved.*

Jones v. Driver, 15 L. D. 514, and 17 L. D. 103.

The law relating to location and acquisition of placer mining ground is the same whether the mineral it contains be gold, silver, quicksilver, petroleum or anything else.

Gird v. California Oil Co., 60 Fed. Rep. 541.

In the recent case of Elder Mining & Milling Co., decided by the Secretary of the Interior, October 30, 1899, 29 L. D., 279, the old doctrine that the character of a given tract of land cannot be affected by the character of adjacent lands, is re-affirmed in the following language:

"Neither can the tract in conflict be assumed to be mineral because it is situated in a mineral belt and

mining district, and is adjacent to numerous mining claims."

Discovery to support a valid mining location must be within the limits of the claim, and discoveries on adjacent locations are insufficient.

Michael v. Mills, 22 Col. 439.

In the case of Nevada-Sierra Oil Co. v. Home Oil Co., 98 Federal, 674, in a controversy between contending placer claimants for certain oil lands, the Circuit Court for the Ninth Circuit held that to constitute a discovery which would support a location of public lands as a placer oil claim, a locator *must have actually discovered oil within the limits of the claim; that mere surface indications, however strong, are not sufficient, nor is the existence of oil on adjacent lands.*

To the same effect and reviewing all of the previous decision on the subject see

Olive L. & D. Co. v. Olmstead, 103 Fed. 568,

which we submit correctly states the law governing this case in all its phases.

What are mineral lands? Lands on which no mineral has been discovered and which are not returned and classified as mineral, are in law non-mineral, regardless of the hidden or undiscovered minerals they may contain.

The assumption upon which the argument of appellees proceeded in the court below, was, that it is a fraud upon the government for one to undertake to acquire title to land based upon its *then* recognized legal status, if such party hopes or believes that future operations or developments, or subsequently arising conditions, may change that status to one which would not permit the

land to be acquired by the method he was adopting. In other words, their claim is that it was a fraud upon the Government for one to purchase land from the Government which is returned as agricultural and non-mineral in character, and upon which no minerals have been found or discovered, if such purchaser entertains the hope or belief that the lands in question may subsequently prove to be mineral in character. We submit that such a contention is wholly erroneous.

"Mineral land" in law is not land in the hidden depths of which valuable mineral deposits *exist*, but it is land in which mineral deposits have been *found;* and until such mineral deposits are found, lands containing the same are in law non-mineral [Bonner v. Meikle, 82 Fed., 697]. It is only, however, by persistently ignoring this doctrine—on which all the authorities agree—that counsel for appellees are enabled to infuse into this case their oft-repeated argument, that selectors under the Act of June 4, 189_, seek to acquire title to "MINERAL LANDS," *without the necessity or expense of making a discovery of mineral.* This supposed reprehensible conduct of selectors necessarily loses some of the odium which appellees seek to attach to it, the moment that the incongruity of the statement is analyzed; for until a "discovery of mineral" is made upon land, it is not in law "mineral land;" especially where it is returned as agricultural; and to say that one seeks to acquire title to "mineral lands" without the necessity of making a discovery of mineral thereon, states a contradiction, as the land is *not* "mineral land" if a discovery of mineral *has not been made* thereon. When this is borne in mind, the foundation upon which appellees seek to rest their whole fabric of bad faith, improper motive and fraud, disappears; for until land is "mineral land" in law, that is, until a discovery of mineral has been made upon it, it is subject to acqui-

sition under the non-mineral land laws; and it is no violation of the spirit of these laws to acquire title by them to any land not shown to be mineral by discovery.

The very term "mineral lands" necessarily, if correctly used, assumes that minerals have been found upon the lands. The law deals with land, mineral or otherwise, under the act of June 4, 1897, based upon its *known* character, *at the time the exchange of properties contemplated by that act takes place*, and will not take into consideration the hopes or expectations of the selector, the motives or inducements actuating him, or the purposes or uses to which he intends to put the selected property.

The fallacy of the appellees, entire theory is in assuming that while land may not be mineral land, in the sense that one can make a valid mining location thereof under the placer mining laws, on account of the absence of known mineral thereon, yet it is mineral land to the extent that it is not subject to entry under any of the non-mineral laws. This is a fatal error, that runs through the whole warp and woof of appellees' argument. *There is in law no neutral zone in which land is neither the one thing nor the other.* Land remains non-mineral in character, and subject to entry under the non-mineral laws, until by mineral discovery made thereon its legal status is changed to mineral land, and until such discovery is made it is subject to acquisition under the non-mineral land laws, regardless of the hopes, beliefs or expectations of the party acquiring it.

We have Executive, Legislative and Judicial approval of our contention that lands supposed or believed to be valuable for oil, but upon which no oil has been discovered, are subject to acquisition under the Act of June 4, 1897, and that the placer mining laws afford no protection to claimants of such lands.

The use by complainant's predecessor in interest of the Forest Reserve Lieu Land Act as a means of acquiring title to lands *supposed* or *believed* to be valuable for oil, but upon which no oil had ever been discovered, and which was returned as agricultural in character by the Surveyor General, is considered so reprehensible by our opponents that they characterize it as unlawful, inequitable and even fraudulent as against parties asserting title to such lands under the placer mining laws.

We submit that the inadequacy of the placer mining laws to afford protection to claimants of lands *supposed* to be valuable for oil prior to discovery of oil thereon, has been emphasized by all three Departments of the Government, the Executive, Legislative and Judicial branches; and the sufficiency of the Forest Reserve Lieu Land Act as a means of acquiring title to such lands has been announced in equally emphatic terms by each branch of the Government.

Recognizing that until discovery of oil, the existing placer mining laws afforded no protection to a placer oil

claimant the Commissioner of the General Land Office in his annual report to Congress for 1900 (pp. 76-77) recommends that Congress pass an act which shall provide that a valid placer mining location of land "*believed* to contain petroleum," may rest for three months on the *belief* of the claimant, that the land contains petroleum, without the necessity of having an actual prior discovery of oil upon which to base such location; and that if work on the claim begins within three months and continues thereafter without interruption that the claimant may have twelve months within which to *discover oil*, and that during such period the land shall not be open to entry by others; thus clearly recognizing that under the *existing* law no protection is afforded to one claiming *supposed* oil lands under the placer mining laws until *after actual discovery of oil* on the land; and in the same annual report the Commissioner of the General Land Office, on page 100 and page 120, recognizing that such supposed oil lands are open to acquisition under the Forest Reserve Lieu Land Act, and that no Forest Lieu selections of such lands can—as the law now stands—be rejected by the Land Department because of the discovery of mineral on the selected land after the selection thereof, and in order to change the law in this respect, recommended to Congress "that some legislation be had authorizing the rejection of any and all selections under such act [the Act of June 4, 1897], for land returned as agricultural, should it be discovered before the approval of the selection by the Land Office that the land involved is chiefly valuable for mineral."

No stronger official and executive confirmation of the soundness of our position can be found than is afforded by these two requests of the Land Department for *new* legislation, the very necessity for which demonstrates that the *existing* law is just as we claim it to be.

Recognizing the truth of the Commissioner's statement contained in the foregoing recommendations for new legislation, that the existing placer mining laws do not furnish any protection to an oil claimant until an actual discovery of oil has been made upon a claim, and that until such time the non-mineral land laws are applicable to the acquisition of title thereto, and following the suggestion of the Commissioner that in the future the necessity of an actual discovery of oil be dispensed with, and that the *belief* of the claimant as to the oil character of the land be substituted therefor, the Committee on Mines and Mining of the United States Senate on February 23, 1901, favorably reported a bill authorizing the *direct purchase* from the Governmant in limited quantities of lands *believed* to be chiefly valuable for oil. See Senate Bill No. 5899, and report thereon, Division One, appendix to this brief.

But instead of restricting the application of existing laws which operate as immediate purchases from the Government, so that they would not apply to the acquisition of such *supposed* oil lands, the Senate Committee in its report upon such bill directly affirm that such laws are applicable, but that they do not *in themselves* furnish a sufficiently ready and available means, in all cases, to acquire title to such lands, and hence it recommended the necessity of an additional law giving the right of direct purchase from the Government for money. The following excerpt from the Committee's report is directly in point:

"The existing placer mining laws which the Courts and the General Land office hold to require an actual discovery of mineral or petroleum as the very basis of a placer mining location, are not adapted to the acquisition of petroleum lands, owing to the fact that petroleum—unlike placer gold—is rarely found upon or near the surface,

and can only be discovered by expensive drilling operations. Hence these laws do not apply or give rights to the prospector prior to the actual discovery of oil, during the time necessarily consumed in drilling discovery wells. As *the claimant acquires no rights by the mere attempted location prior to the actual discovery of mineral or oil*, his claim is subject to exploration by any rival claimant, and the first to discover mineral or oil will acquire the better title regardless of the priority of attempted locations. Where the lands in question are returned as agricultural, they are notwithstanding their undiscovered or supposed mineral character, in law non-mineral, prior to discovery of mineral or oil, and although in possession of the mineral claimant, they are vacant and open to settlement, and subject to acquisition under any general or special land laws, entries under which operate as immediate purchases from the Government. Under this head come military bounty land warrants, Sioux half-breed, Porterfield, and other scrip, Forest Lieu Land selections, etc. *The rights of parties acquiring title under these laws depend upon the known character of the land at the time of entry or selection under such laws.* * * * It is therefore clear that lands supposed to be valuable for oil, but upon which no oil has been discovered, are open to acquisition under the agricultural land laws; but these laws alone are not adequate to meet the situation, as such scrip, land warrants, and Forest Reserve lands, with which supposed oil lands may be acquired, are limited in quantity, and held by private parties, and therefore not readily obtainable."

The report then proceeds, and closes with a recommendation of the bill proposed by the Committee, which permits the outright purchase of supposed oil lands from the Government, in tracts not to exceed 160 acres, at $2.50 per acre, based upon the affidavit of the purchaser that the same is *believed* to be valuable for petroleum.

Dealing, as it does, with a situation identical with that presented to the Court by the cases at bar, this report of the Senate Committee is of great importance.

As emphasizing our position, that there is no inherent sanctity nor peculiar appropriateness in the mining law, as compared with other appropriate laws, as a means of, acquiring title to *supposed* oil lands, but that what was needed was a law that would give certainty of protection and title to those seeking to acquire such lands, the Senate Committee on Mines and Mining—the legislative source of nearly, if not quite all of our mining laws—reported in favor of allowing an *outright purchase* of such lands at $2.50 per acre. Yet, when we have the temerity to suggest that the Forest Reserve Lien Land Act is available for that purpose, our opponents cry out as if we were committing anti-mineral blasphemy. The idea of *others* trying to acquire title to supposed oil lands without complying with the mining laws is in the eyes of our adversaries unpardonable. If it is not reprehensible to *buy* supposed oil lands from the Government at $2.50 per acre, as recommended by the Senate Committee, we submit that to *trade* Forest Reserve lands which sell at from $5 to $10 per acre for such supposed oil lands cannot be a great offense.

For *judicial* disapproval of the placer mining laws as a means of acquiring title to supposed oil lands upon which no oil has been discovered, we refer the Court to the case of the Olive Land and Development Company, 103 Federal, 568, which was a controversy practically identical with the cases at bar. In the course of the opinion, the learned Judge for the Ninth Circuit (Judge Ross) said:

"In the very recent case of Nevada Sierra Oil Co. *vs.* Home Oil Co., 98 Fed. Rep., 673, it was here decided, as it had been many times before by other courts, as well as by the Land Department of the United States, that mere indications, however strong, are not sufficient to answer the requirements of the statute of the United

States relating to placer, as well as lode claims, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim. That decision seems to have occasioned surprise among those seeking to acquire from the Government lands *supposed* to contain oil, although it was, as was shown in the opinion delivered at the time, in strict accord with the provisions of the statute, and is abundantly supported by the authorities. [Citing authorities.] It is a matter of common knowledge that, in consequence of the decision in the case of Nevada Sierra Oil Co. *vs.* Home Oil Co., strenuous efforts were made by strong and influential organizations to induce Congress at its last session *to dispense with the necessity of an actual discovery of oil as a basis of acquiring such lands under the placer mining laws*, and to provide that certain indications of the existence of such mineral should be sufficient evidence of the mineral character of the land; but all these efforts were unsuccessful and the law remains the same in that respect as before. Applying the law to the facts as made to appear by the pleadings in the present case, *it is clear that the location of the lands in controversy* by the predecessors in interest of the defendants in October, 1899, *under the statute relating to placer claims, amounted to nothing, for the reason that no discovery of oil or other mineral had been made.*

Neither the defendants nor their predecessors in interest had made such a location as prevented the lands from being in law vacant. Others had the right to enter upon the lands for the purpose of taking them up under the mining laws, if it could be done peaceably and without force, *or to acquire the Government title thereto by any other legal means.*

The Court concludes—

"The case as presented showing that the complainant has an equity in the land in controversy which may ripen into a perfect legal title is entitled to the interposition of a Court of Equity to perfect that right as against trespassers who confessedly threaten to enter thereon and despoil the property of its *chief, if not its only value.*"

Lands chiefly valuable for petroleum are not "mineral lands" in the sense that they are excluded from acquisition under the non-mineral land laws.

In view of the fact that the words "lands valuable for minerals" and the words "valuable mineral deposits" contained in the mining laws, and the words "any mineral lands," contained in the homestead law —which words alone restrict and limit the lands subject to acquisition under the non-mineral land laws— were inserted in such laws, at a time when Congress only designated *specific named metaliferous minerals* as subject to acquisition, under the mineral land laws; and especially in view of the fact that the courts had already confined the meaning of such words to the *auriferous and metaliferous ores and deposits*,—we maintain that in no correct sense can it be said that "lands chiefly valuable for petroleum," under the Act of February 11th, 1897, are included within the phrase "mineral lands"—which was incorporated into the Statute over twenty-five years before—so as to exclude such lands from acquisition, under the non-mineral land laws. On the contrary, we believe it is perfectly clear that Congress never intended by permitting "lands chiefly valuable for petroleum" to be acquired under the provisions of the placer mining laws, to thereby exclude such lands from acquisition, under the non-mineral land laws; but it was only intended thereby to furnish an *additional means* by which such lands could be acquired, just as Congress, by passing the stone and timber act, and the act permitting lands chiefly valuable for stone, to be acquired under the placer mining laws, never intended to exclude such lands from acquisition under the laws *already* applicable thereto, but merely intended to furnish *additional* means that seemed appropriate for acquiring title to such lands.

As complainant's rights in these cases, however, do not depend upon sustaining this position—although we believe it to be sound — we do not take the court's time *here* to analyze and discuss this question, but call the Court's attention to the discussion on this subject contained in the appendix hereto.

II.

Review of the position of the Circuit Court of Appeals and of our adversaries in these cases—that land staked off as a placer mineral claim, and occupied by mineral claimants, without discovery of mineral thereon, is not vacant land open to settlement, even if the settlement be peaceably made, and that such staking off and occupancy prevents one acquiring title thereto by selecting the same under the act of June 4, 1897, and herein of the rights of mineral claimants before mineral discovery as against persons who comply with laws for acquiring title.

The following extended excerpts from the opinion of the Circuit Court of Appeals, and from the opinion of the dissenting Judge, make the position of that Court perfectly clear and show that the judgment of the court was based upon the definition of "vacant land open to settlement," as used in the Act of June 4, 1897, and upon the holding that "vacant land" was the equivalent of "*unoccupied lands*," and that the presence of a prospector previous to discovery of mineral, excluded the land from selection under the Act of June 4, 1897.

In the majority opinion it is said:

"The plaintiff's contentions are: 74. That lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the land office records, unless they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes: (2) that defendants' mining locations are void because no discovery of petroleum had been made at the time of the location, nor until after the lands had been selected by appellants' grantor, and that, notwithstanding the mining locations of appellees, the land was vacant and open to settlement at the time it was selected. * * * That the equitable title to lands selected in lieu of patented lands relinquished, vests at the date of selection and cannot be impaired by subsequent mineral discoveries in the land.

"On the part of appellees (1) that lands are vacant and open to settlement, and therefore subject to selection under said act only when they are *unoccupied by others.* * * * (2) That lands selected under said act * * * remain open to exploration under the mining laws until the approval of the selection by the land department, and if at any time after the selection and before its approval, the selected land is discovered to contain valuable mineral deposits, its mineral character will be thereby established and the selection defeated.

"76. * * * The party relinquishing his forest reserve land 'may select in lieu thereof a tract of *vacant* land open to settlement.' He cannot select in lieu thereof any tract of public land that is not *vacant* nor open to settlement.

"77. What is the meaning of the words 'vacant lands open to settlement'? * * * The ordinary meaning of the word 'vacant,' in its general use, is to be empty, or unfilled. * * * *Vacant lands are such as are absolutely free, unclaimed and unoccupied.* 'The word "vacant"

when applied to lands means those which have not been appropriated by individuals.' Marshall v. Bompart, 18 Mo. 84-87. * * * 78. From the allegations of the bill, it appears that at the time of appellants' selection of the lands in question no discovery of any mineral had been made. Appellees could not, at that time, have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose; but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. *They were in occupancy of the land they had located.* * * * *Under these circumstances it cannot, in our opinion be said to be vacant land at the time of appellants' selection* thereof under the provisions of the Act of June 4, 1897. *The land was not vacant and open to settlement because it was then occupied by the defendant's grantors* under a claim and color of right. *It matters not that they had not at that time any rights against the United States.*

"It is true that no valid location of a mining claim can be made under the mining laws, until a discovery of mineral. [See 2320, R. S. U. S.]. * * * It does not, however, follow that because no mineral was found, the land in question was *unoccupied*. * * * 79. But whatever his rights may be, *the fact that the miner [prospector] is in the actual possession* without having made *any location at all shows that the land is not 'vacant.'* * * *

"80. The contention of appellant, that the act of Congress has reference *only to vacant land open to settlement which appears upon the books of the land department, cannot be sustained.* * * * The contention of appellant would, if its doctrines were to prevail, lead to results which are denounced in Atherton v. Fowler, 96 U. S. 513-516, as being antagonistic to the true intent and meaning of the pre-emption laws. In that case it was held that the right to make a settlement is only one to be exercised on unsettled lands; that the right to make improvements, is to

be exercised on unimproved land; that the right to erect a dwelling house is to be exercised only on vacant land, and none of these things can be done on land when it is occupied and used by others. * * * 82. Having arrived at the conclusion, from the facts stated in the bill of complaint and the principles of law applicable thereto, that the lands selected by the grantor of appellant were not at the time of such selection, *vacant* land open to settlement, *it is unnecessary to review the many other questions which were elaborately argued* by the learned counsel. It necessarily follows from the views that we have expressed, that the bill of complaint does not state any cause of action entitling appellant to any relief."

Circuit Judge Gilbert dissenting, in an opinion of great clearness, said:

"84-5. What is the nature of the right of a prospector upon the public lands of the United States. It is settled that he is not a trespasser. On the contrary, he is invited to explore and to occupy. By the act of May 10, 1872, all valuable mineral deposits are declared to be free and open for exploration and purchase 'and the land in which they *are found* to occupation and purchase.' It will be observed that by the terms of the statute the *right to occupy follows the discovery*. There is no statutory right of possession or occupation or any other right whatever conferred by any statute prior to discovery, save and except the right of exploration. While permitting the freest exploration, it does not appear to be the purpose of the legislation in regard to the mineral lands of the United States to permit a prospector or an intending locator to initiate any kind of right to such lands prior to a discovery, or to permit by any act of his prior to discovery to interfere with the appropriation and settlement of lands as agricultural lands under the public land laws or other laws offering such lands to selection or appropriation. All the decisions to

which my attention has been directed are reconcilable with this view. The courts have gone no further than to hold that the possession of a prospector may not be interfered with by one who has no better right than he. This has been held, not as the construction of the mining laws, but upon motives of public policy to prevent entries by force and violence. One in possession of premises, without right or title, may prevent the intrusion of another who is equally without right or title solely upon the ground that possession is *prima facie* evidence of title."

"86-7. If it be the law that vacant non-mineral land upon which a prospector is making his explorations, is not open to selection as lieu land, *and that such a prospect or by his mere presence, or by having dug a hole or erected a derrick*, acquires the right to claim possession of the land until his explorations shall be finished, what is the limit of the right and where is the halting place? What acts of a prospector shall be sufficient and what shall not be sufficient to withdraw such lands from settlement or from selection as agricultural lands? * * * *How extensive an area of the public domain and for how long a period of time may a single prospector so occupy that it shall not be open to settlement or selection?* It is no answer to these inquiries to say that the court will not, in the present case, define the nature of the acts which will constitute such a possessory right but will content itself with the conclusion that the acts set forth in the case at bar are sufficient. I submit that the decision imports into the statute terms that are not there written and that were not within the intention of Congress, and that by the use of the words "vacant land open to settlement" the intention was to refer the selector of lieu lands to the records of the land office and to the condition of the land itself, whether in the open occupation of a settler holding the possession with the avowed intention of acquiring title under the public land laws, and not to

leave the question "What are vacant lands open to settlement?" to be invariably answered by the courts upon the special facts presented in each case."

We maintain that in these cases the mineral claimants at the time of the forest reserve lieu selections were made had acquired no rights such as could defeat such selections, for no mineral discovery had been made, and the mining locations were prohibited by Section 2320, R. S., and were void. The opinion of the Circuit Court of Appeals, hereunder review, admits and clearly states the law to be as we claim that "no valid location of a mining claim can be made under the mining laws until a discovery of mineral," and that the appellees—by their mere staking off and possesion of mining claims without mineral discovery—"had not at that time [when the lands were selected under the Act of June 4, 1897] acquired any rights against the United States." Thus clearly admitting that the "mining locations" *per se* give no rights to the locator until mineral is *discovered*, and yet it is said that such mineral claimants "*had a lawful right to be there, they were in occupancy of the land they had located. * * * The land was not vacant and open to settlement at that time because it was then occupied by the defendants' grantors under color of title,*" although no mineral had been discovered—and therefore the land was held to be not subject to selection under the Act of June 4, 1897.

Upon the soundness of this position the whole decision rests. It will be noticed that the Circuit Court of Appeals does not go to the extent—as the Secretary of the Interior does in the Kern Oil Company case, *supra*, of holding that a mere *ce facto* or nomadic occupancy "*by one having no thought of acquiring title,*" prevents land being vacant, but holds that a prospector before mineral discovery has "a right" of possession which not only renders his occupancy "lawful" to the

extent that he is not a trespasser upon the public domain, but gives him the *exclusive right* of possession, so that the land is by virtue of his mere presence thereon, rendered not subject to acquisition by others. We submit, that while the authorities do hold, that the possession of a mineral claimant before discovery of mineral, is good as against a *forcible intrusion*, and as against those having *no better title*, yet no authority can be found other than the present decision, sustaining the doctrine that such possession *appropriates* the land, so as to exclude it from the operation of the settlement laws, or so as to prevent a peaceable settlement thereon, or to prevent the Government granting, selling, exchanging, or otherwise disposing of it to any one who complies with the requirements of the laws provided for the disposition of the public domain. The position of the Circuit Court of Appeals in this respect is based upon the fundamental erroneous assumption that under the mining laws the mineral claimant prior to the discovery, has a right to *occupy* land, whereas the only right he has before discovery is to *explore*. It is only after mineral *"is found"* that the Statute gives the right of *"occupation* and purchase." When discovery is lacking no right exists to make a mining location, or to the exclusive possession of public lands by mineral claimants. Mineral rights in public lands depend upon and are measured by the laws of the United States conferring them. Section 2319, R.S., declares "all *valuable* mineral deposits" in public lands are "free and open to exploration and purchase, *and the lands in which they are found to occupation and purchase.*" Section 2320, R. S., provides that *"no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."* Our contention here is that the possession of a mineral claimant under a *premature* mining location—that is, under a

location made *before the discovery of mineral thereon* —in no way prevents the land being *in law "vacant;"* as a location before discovery is expressly prohibited by the Statute. In the leading case of BELK v. MAEGHER, 104 U. S., 279, this court had under consideration the effect of the possession of a mineral claimant under a premature mining location—that is under a location made before the law permitted it, and while the land was still covered by an existing valid mining location—and referring to such a locator and his possession thereunder said:

"This brings us to the inquiry whether the possession of Belk after the first of January [when the former location expired] was such as to prevent the defendants from making a valid re-location, and acquiring title under it. * * * *He had no right of possession.* * * * He had made no such location as prevented the lands from being *in law* VACANT [that is, his location was premature, just as a location, without mineral discovery,—being prohibited by law,—is premature]; *others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in Atherton v. Fowler, 96 U. S., 513, to the contrary of this.* In that case it was held a right of pre-emption could not be established by a *"forcible"* intrusion upon the possession of one who had already settled upon, improved and enclosed the property. Upon that proposition, the court was unanimous. We also all agreed that if a peaceable entry had been made on lands which had not been enclosed or improved, a good right might have been secured."

This construction of Atherton v. Fowler is important in view of the fact that the Circuit Court of Appeals in these cases relies largely upon such cases as justifying its decision here. We review the Atherton v. Fowler case later. It certainly cannot be claimed that the court here used the word "vacant" as meaning "unoccupied," as the land is held to be *"in law vacant,"*

though *in fact occupied*, and the very question was, as to *the effect of Belk's possession*. This case is especially in point here, dealing as it does with the very *character of possession here relied upon*, namely, *the possession of a mineral claimant under a void location*. Here the court is not dealing with Land Office records at all, and uses the word "vacant" as meaning "subject to disposition," or as not "legally appropriated" and we insist that it is never used by the courts or Congress as meaning "unoccupied," unless the occupancy referred to is one that operates to legally appropriate the land.

Elsewhere, in Belk v. Maegher, the court says:

"The right of location upon the mineral lands of the United States is a privlege granted by Congress, but it can only be exercised within the limits prescribed by the grant. *A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail.* Hence, a location on lands actually covered at the time by another valid and subsisting location is void, and this is not only as against a prior location, but all the world,*because the law allows no such thing to be done.* * * * THE RIGHT OF POSSESSION (as against one claiming under color of title), COMES ONLY FROM A VALID LOCATION. *Consequently, if there is no location, there can be no possession under it.* * * * As in this case, all these things were done, when the law did not allow it, they are as if they had never been done. * * * A location, to be effectual, must be good at the time it is made."

We submit that this language, although applied to a location which was premature, because the land located was not then subject to location, because of an existing prior, valid location, is equally applicable to a location made before the discovery of mineral, which is not only not authorized, but *is expressly prohibited* by law.

Speaking of the rights of the premature locator, after the forfeiture of all rights of a prior locator, the court says:

"He apparently exercised no other acts of ownership after January 1st than every *explorer* of the mineral lands of the United States does, when he goes on them and uses his pick to search for and examine for lodes and veins. *As his attempted re-location was invalid, his rights were no more than those of a simple explorer.* * * * His position might have been such as would have enabled him to bring an action of trespass against one who had entered *without any claim of right, but it was not enough, as we think, to prevent an entry, peaceably and in good faith, for the purpose of securing a right under the Act of Congress, to the exclusive possession and enjoyment of the property.* * * * The possession of Belk was that of *a mere intruder*, while that of the defendant was accompanied by color of title."

Here this court classed the possession of a mineral claimant who has prematurely made a mining location before he was allowed to do so under the mining laws, as that of a "mere intruder," and we submit that this is a correct definition of his status, when he attempts to maintain the right to the exclusive occupancy of his claim against one having *a better title*, as is the case here. The Statute, Sec. 2319, R. S., relied upon by defendants, does not purport to give the right of occupancy to the mineral claimant, until after mineral "is found"—that is, until after a *valid* mineral location has been made; and while the entire public domain is open to "explorers" for mineral, no right of occupancy is acquired in any claim by an explorer as against another explorer, or as against any one claiming under color of title, until after mineral *is found*, and when such an explorer, *as against one having better title*, asserts title or the exclusive right of occupancy prior to mineral discovery, he is a mere intruder, just as he is held to be a mere intruder in Belk v. Meagher.

The prospector's position is this: The Government says to him: This is the public domain subject to dis-

posal under the land laws. You may explore it for mineral, you may dig holes into it in search for minerals, and we will not punish you for it. If you do not fill up the holes after you quit digging, we will not claim damages for that. If you discover mineral—to the area limited by the law—you may hold exclusive possession, exploit the mineral, and if you wish may buy the land, but understand (Section 2320) you cannot locate any mineral claim on any of this land *until you have discovered a valuable mineral deposit,* nor have exclusive right to occupy the land in which you seek the mineral until you have made such a discovery, then, and then only, to such limited extent, the land shall be subject to your exclusive occupancy. Until that time you are an explorer and prospector but not an occupant. Until that time you cannot exclude the land from other appropriation, or acquire the right to occupy it, and we will offer it for disposal and dispose of it as we see fit without regard to you. Now, if you will go on to the land as a prospector, go. On these conditions you have our license to search for mineral, but nothing more, until you make a discovery of valuable mineral, we make no reservation of it for you. Be diligent, your rights to the land depend on prompt discovery. It is only by a discovery that you can hold the land from other disposition, or entry.

The Statutes covering this phase of this controversy, Secs. 2319-2320, R. S., are as follows:

"Section 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and *the lands* in which they *are found* to *occupation* and purchase," etc.

Sec. 2320. "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim."

The following cases are directly in point and hold that there is no right of possession in the mineral claimant before he has complied with the mining law.

In Hopkins v. Noyes, 4 Montana, 550-556, the court says:

"Possession within a mining district, to be protected and to give validity to title, must be *in pursuance of the law* and the local rules and regulations. *Possession, in order to be available,, must be properly supported;* it must stand upon the law and be the result of compliance therewith. * * * Possessory titles do not stand upon possession alone; *they must be supported by the proofs of compliance with the law that governs the right and sustains the possession.*"

In Garthe v. Hart, 73 Cal., 543, the distinction is clearly drawn between the right of a party in possession of a mining claim, as against mere intruders and his rights as against one who has complied with the law. The court quotes a part of the instructions of the lower court, which reads as follows:

"As I said there is still another way by which a miner in this State may acquire a right to possession of a piece of mining ground: *It is by taking possession of it and clearly defining the boundaries, so that they may be readily traced, and holding such possession, keeping such possession.*"

(The italics are the court's.)

After thus quoting from the instructions of the lower court to the jury, the Supreme Court of California says:

"In the hurry of the trial, the learned judge evidently overlooked the distinction between the right of a party in possession *as against mere intruders,* and his right *as against one who has complied with the mining laws. Possession is good as against mere intruders* [citing a number of cases which are here relied upon by our opponents], *but it is not good as against one who has complied with the mining laws.* [Du Prat v. James, 65 Cal., 556, 557]."

In the case of Du Prat v. James, referred to, it was held that the failure of a locator of mining claims to perform the amount of labor as required by the laws of the United States subjects a claim to a re-location;

and that a peaceable entry in good faith may be made for that purpose, although the claim is occupied by an original locator, thus showing that mere possession of a mineral locator in no way appropriates the land, or prevents it from being acquired by others, even after discovery.

In Horsewell v. Ruiz, 67 Cal., 111, it was held:

"That the party in possession, relying upon prior possession, without compliance with the mining laws is —from the date of perfecting the subsequent location of the same ground by another in compliance with the law—a *transgressor* the subsequent locator being entitled to the possession."

Location before discovery is a nullity, and is therefore ineffectual to support a claim of possession or occupation. Section 2320 of the Revised Statutes plainly provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." And although there is authority to the effect that a location made before discovery becomes valid *as of the date of a discovery subsequently made in the absence of any intervening adverse rights*, yet the cases in which this doctrine is asserted, recognize and declare that no right of possession, or any other right, flows from a location made prior to discovery. In the case of Erwin v. Perigo, 93 Fed., 608, the Circuit Court of Appeals for the Eighth Circuit said:

"The Acts of Congress prescribe *two*, and only two, pre-requisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States, within the limits of his claim, of a mineral-bearing lode, and the distinct marking of the boundaries of his claim so that they can be readily traced. *No appropriation of the land is made until both these requirements are fulfilled, and until that*

time, the lode and land sought are open to location and appropriation by any competent locator."

And, being subject to location by any other competent locator, which necessarily warrants an entry upon the land itself, it is of course subject to acquisition by proper proceedings in the Land Office, where no entry upon the land itself is required by the law, as is the case here.

In Jupiter Mining Company v. Bodie G. M. Co., 11 Fed., 666 (675), Judge Sawyer said:

"No rights can be acquired under the Statutes by location made without discovery of a vein or lode within the limits of the claim located."

In King v. Amy & Silversmith Cons. M. C., 152 U. S., 522, this court stated that Section 2320 is in effect, "a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits cannot be permitted. A location can only rest upon an *actual discovery* of a vein or lode."

In Ledoux v. Forrester, 94 Fed., 600, the court says that Sec. 2320, R. S., requiring discovery before location, is "mandatory."

No court is more familiar with mining law, and none is held in more respect as authority than that of California, which held November 25, 1901, in Tuolumne Consol. M. Co. v. Maier, 66 Pac. 863-4, 134 Cal., 583, that "we take it to be conceded law that there can be no valid mining location of mining claim *without an actual discovery thereon.* [Erhardt v. Boaro, 113 U. S., 535; O Reilly v. Campbell, 116 U. S., 418]. * * * *There can be no valid claim to the land, and it must be treated as government land up to the time of such discovery.* * * * There was an entire absence of evidence showing such discovery at any time previous to the construction of appellant's ditch. Treating the land then *as government land* at the time of the construc-

tion across it of appellant's ditch, whatever rights may have been acquired in it by the subsequent discoveries of mineral was subject to the easement of plaintiff's ditch, and to his right as a prior appropriator."

Here a mining location, prior to discovery, and occupancy by prospector, did not prevent the land from being vacant or exclude it from appropriation by another for right-of-way for his ditch.

The case of Enterprise Mining Co. v. Mining Co., 167 U. S., 108, holds that while *a tunnel locator* acquires, *at the time of his location*, an inchoate right to the vein which he subsequently discovers, it emphasizes the proposition that the *surface locator* acquires no right, inchoate or otherwise, until a discovery of mineral is made.

Placer claims stand on the same footing as to necessity of mineral discovery as do lode claims. Sec. 2329, R.S., authorizes their location only under "like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims." Without discovery a placer location no more appropriates land than does a lode location.

Placer mining locations of lands for petroleum are controlled by the same rule, as to necessity of discovery, as lode locations.

Nevada-Sierra Oil Co. v. Home Oil Co., 98 Fed., 673;
Gird v. California Oil Co., 60 Id., 541;
Olive L. & D. Co. v. Olmstead, 103 Fed., 568.

It is manifest from the foregoing authorities that, until discovery, mere location does not give to the locator the right of possession of the land located, nor any other right or interest therein whatsoever *as against any one complying with the laws for acquiring title thereto*. Until discovery he has no more rights than any other mere prospector, and the undiscovered

mineral deposits in the land located by him continue to be open to exploration, and the located lands to purchase from the government under any general or special laws relating to their acquisition.

As against parties complying with the law and having a better title, the occupancy of a mineral claimant before mineral discovery is no more protected by the law than the mere de facto occupancy of one having no thought of acquiring title.

The only respect in which the occupancy of public lands by mineral claimant, prior to mineral discovery, differs from occupancy of any mere nomadic occupant, not claiming under color of title, is that since the passage of the Act of February 25, 1885 [23 Stats. 321], *occupancy of the latter kind is actually prohibited by statute.*

Realizing, however, that as against parties claiming under better title, that the occupancy of a mineral claimant, prior to mineral discovery, rests upon no sounder basis than the occupancy of a mere nomad, having no thought of acquiring title and not claiming under color of title, the Land Department, in the case of Kern Oil Co. v. Clarke, 30 L. D., 550, in holding the word "vacant" in this act to mean "unoccupied," nowhere asserts that a mineral claimant, before mineral discovery, has any higher right than a mere *de facto* occupant, who has "no thought of acquiring title," or that land is any less "vacant" by occupancy of the former, than by occupancy of the latter.

But, being well aware of the fact that the law does not recognize in the mineral claimant, prior to mineral

discovery, any rights as against one claiming under superior title—that is, as against one properly connecting himself with the government title by compliance with some statute for the disposal of such land—the department did not attempt to set up any *right* of possession in the mineral claimant, prior to mineral discovery, but based its decision on the ground that mere occupancy *"with no thought of acquiring title"* excluded land from selection under the Act of June 4, 1897.

(See bottom of page 567 and top of page 568, Opinion Kern Oil Co. case.)

The occupancy of a mineral claimant is never mentioned in that opinion; and if in the opinion of the department, *such occupancy*, prior to mineral discovery stood upon a higher plane, or was any more protected, than that of the mere *de facto* occupancy, referred to in the excerpt from Tarpey v. Madsen quoted in the opinion, this fact would have doubtless been mentioned, as it would have materially strengthened the conclusion reached—such being the character of the occupancy to be dealt with there.

The Department, however, was perfectly familiar with the fact that no decision either of the courts or the land department could be found holding that a mineral claimant's possession of the public land prior to mineral discovery gave him any rights as against any lawful applicant for such land.

The Department's opinion proceeds upon the theory that land is not "vacant" if "occupied," regardless of any *right* in the occupant, or of his intention to acquire the title; in other words, it is held that it is the *fact* of occupancy, and not the *character* of the occupancy, or the *right* of the occupant, that prevents it being vacant; this holding is absolutely essential to the conclusion reached by the Department; nothing short of this would have sufficed. And it must be presumed that the De-

partment was aware of this necessity, or it would not have selected as its example of the occupant intended to be protected by the use of the word "vacant" in the Act, one who had "no thought of acquiring to the land."

(See page 567 of the opinion, quotation from Tarpey v. Madsen, and comments thereon at top of page 568.)

We will not anticipate here our elaborate discussion of the meaning of the word "vacant" in this act, which follows later in this brief, but we pause to remark at this point that this mere *de facto* "occupancy," without color of title, which the Department holds is protected by the use of this word "vacant," in the act of June 4, 1897, is the very character of occupancy which is actually prohibited by statute.

Sec. 1 of the Act of February 25, 1885 [23 Stats., 321], declares that: "The assertion of a right to the *exclusive use and occupancy* of any part of the public lands of the United States * * * without claim or color of title or asserted right * * * with the view to entry thereof at the proper land office, under the general laws of the United States" is unlawful and prohibited; and we submit that in the face of the positive prohibition of this statute, it passes all reason to believe that Congress in enacting the statute here in question, could have intended by the use of the word "vacant" to protect this proscribed and prohibited character of occupancy.

Review of cases relied upon by the Circuit Court of Appeals as sustaining its conclusions.

The cases chiefly relied upon by the Circuit Court of Appeals and by our adversaries as sustaining such court in its conclusions are the following:

Crossman v. Pendery, 8 Fed. Rep., 693, and Field v. Gray (Ariz.) 25 Pac. Rep., 793, and the doctrine laid down in Atherton v. Fowler, 96 U. S., 513, Hosmer v. Wallace, 97 U. S., 575, and cases similar to Atherton v. Fowler and Hosmer v. Wallace.

We respectfully submit that none of these cases sustain the court's position. The cases of Crossman v. Pendery and Field v. Gray have no weight in these cases, as they only apply *"against parties having no better right."* This is made clear and shown to be the fact upon the face of these very decisions. In Crossman v. Pendery, the court was speaking of the rights of a second rival mineral claimant, who, *prior to his mineral discovery,* had no better right to the premises than the plaintiff, the first locator, neither being of his own right entitled to exclusive possession, and both, under the law, being equally entitled to explore the land; and the case directly decides that all of the rights of the first locator were immediately extinguished and defeated as soon as the second locator acquired a better title by the discovery of mineral within the claim; thus showing that the original possessory title, not based upon any discovery of mineral, was worthless against a better title obtained by another's compliance with the law,—which compliance gave that other the exclusive right of occupancy.

In Field v. Gray, 25 Pac., 793—which seems to be the chief reliance of counsel for defendants—so much of the opinion as is relied on by our adversaries, is

shown by the court to be mere dictum, and not necessary to the decision, as the court states that:

"It would be sufficient answer to this [defendant's] position to say that for the purpose of this appeal, there is a substantial conflict of testimony on this point. * * * And another and more decisive answer to defendants' position is that defendants are not in position to invoke the provisions of the Statute [requiring discovery before location] against the plaintiff in this action, for the reason that defendants *claim no right to the premises whatever.*"

The court itself in that case refers to that portion of the opinion which defendants here rely upon, as a mere "discussion" that is "not demanded in the decision of the present case." But, regardless of this decision not being entitled to consideration as an "adjudication," or as authority, it does not help our adversaries here, as it shows the possessory right there recognized was upheld only against defendants, who claimed "no right to the premises whatever," and the opinion is careful to sustain the possessory right only *"against all parties having no better right."* When analyzed, it is apparent that the doctrine of these two cases [Crossman v. Pendery and Field v. Gray] really gives the possessor of a mineral claim without mineral discovery no greater right than is, under the decisions generally, accorded to any other *first occupant* of the public domain, who is wholly without title; that is, he may sustain ejectment based upon his prior possession, as against any one having no better title; he recovers *solely on the strength of his prior possession* and not by the force of his mineral location, *and only against a party having no better title.*

The case of Lincoln, Lucky & Lee v. Hendry, 50 Pac. 30, relied upon by the Circuit Court of Appeals as sustaining its position is not applicable. That was a controversy between two parties, *both of whom were*

trespassers, neither having color of title, and the old doctrine is merely reiterated that as between such parties, the one prior in possession can maintain such possession.

These decisions have no weight whatsoever as authority in a case like the present, where the opposing party has acquired a "better title" by accepting and complying with the Government's offer contained in the Act of June 4, 1897, by paying in advance the full, designated purchase price for such lands. Moreover the Supreme Court in Del Monte Co. v. Last Chance Co. [177 U. S., 55, 77] has expressly held that "a location distinctly marked on the ground does not require others to abstain from location."

It is well settled, as stated in Haws v. Victoria Mining Co. [160 U. S., 317], that "*possession alone* is adequate to maintain ejectment against a mere intruder or trespasser without even color of title."

To the same effect see:

Burt v. Penjant, 99 U. S., 180, 182;

2 Greenleaf on Evidence, Sections 311, 618 and 618a;

Hutchinson v. Pearly, 4 Cal., 33;

Nagle v. Massey, 9 Cal., 426.

Nothing more than this was decided in the above mentioned cases relied upon by our adversaries.

The cases of Atherton v. Fowler and Hosmer v. Wallace, and other similar cases relied upon by our adversaries, are wholly inapplicable to this controversy; they either involve some question of the right of a settler to initiate a claim by violence or by some breach of trust, or upon land which, under the law, was not open to settlement owing to considerations other than the prior settlement thereof. The California cases relied upon, following the doctrine of Atherton v. Fowler, are all to the same effect. None of them apply to

peaceable settlements made in conflict with prior settlements, where the first settler had not complied with the law entitling him to hold the land and where the land was otherwise open to settlement. Both the Courts and the Land Department have on numerous occasions, pointed out that Atherton v. Fowler and similar cases are in no way applicable to a situation such as confronts us here where there is no violence, no forcible intrusion, and not even an actual entry upon the land at all, but where all that the entryman was called on to do was done at the Land Office and not on the land.

Atherton v. Fowler lays down no rule of law which even in a remote degree harmonizes with the claim of defendants here. In that case this court merely laid down the rule that a right under the settlement laws could not be initiated by a *forcible* entry upon the possession of another.

In the cases at bar there was no violence, and no intrusion upon defendant's possession. It is therefore clear that Atherton v. Fowler has no application nor similarity to this case.

The cases at bar differ materially and essentially from Atherton v. Fowler in four respects, to-wit:

First. We are the vendees of the Government, and do not initiate our rights by occupancy or possession, but acquire them entirely by a selection made at the Local Land Office.

Second. The Atherton v. Fowler case was between two rival settlement claimants, and not between the vendee of the Government and a person on the land.

Third. The decision in Atherton v. Fowler rests upon the single principle that no claim can be initiated by violence.

Fourth. The settlers' rights in that case were ratified by a specific grant by Congress.

Our position on this subject has been very clearly stated by the Supreme Court of California in the case of Haven v. Haws, 63 Cal., 514. There the question involved was stated as follows:

"Can a qualified pre-emptor, intending at the time of settlement to take the whole of a quarter section, 160 acres, initiate a valid claim to the whole by performing acts of settlement on one 80, while the other 80 is enclosed and cultivated by another person before and at the time the attempt begins? It is insisted by appellant that the officers of the Department of the United States erred in law in holding that the qualified pre-emptor could, under the circumstances stated, initiate his claim, and acquire title to the 80 acres so in possession of another person. Appellant relies upon Atherton v. Fowler, 96 U. S., 519; Hosmer v. Wallace, 97 U. S., 575, and Trenouth v. San Francisco, 100 U. S., 251."

It will be noticed that these are the same cases relied upon by the Circuit Court of Appeals and our adversaries here to sustain their contention.

The court then says:

"These cases do not sustain his position. In Atherton v. Fowler it was held: No right of pre-emption can be established by settlement and improvement upon a tract of public land where the claimant *forcibly* intruded upon the possession of another. Such intrusion is a trespass and cannot initiate a right of pre-emption. The pre-emption laws cannot be made an apology for trespass or acts of violence; but in the case before us, there was no intrusion upon actual or constructive possession of the appellant."

The case of Hosmer v. Wallace is then examined and it is shown that it turned upon the fact that the land there sought to be acquired under the pre-emption laws was not public land, but its title was *sub judice*, being then claimed to be a part of a Mexican Grant, and that before any vested right attached in favor of

a pre-emptor, the prior settler was allowed to purchase the land by Congress, under the Act of 1866.

Trenouth v. San Francisco is next shown to be a mere construction of the act to quiet title to certain lands within the corporate limits of San Francisco, and not to involve the questions at issue.

The question before the court was therefore answered in the affirmative and such a pre-emption filing was sustained, following the previous ruling of the Land Department in the same controversy.

We have already shown that this Court in Belk v. Meagher, *supra*, confines the doctrine of Atherton v. Fowler to *forcible intrusions*, and this construction of that case is again confirmed by this court in the recent case of Del Monte M. & M. Co. v. Last Chance M. & M. Co., 171 U. S. 55-83.

The decision of Haven v. Haws, *supra*, is instructive in reply to another argument of our adversaries, viz: We have always contended that our selections of these lands did not involve any intrusion upon any prior occupancy, if any such there was, for the reason that we were not required to make *any settlement upon the land*, but that our title became perfect by a mere selection *at the Land Office*, no accompanying settlement being necessary.

In response to this argument, our opponents say:

That if no one can lawfully enter upon a tract in possession of another for the purpose of initiating a claim, neither can he do so *by standing outside of the claim* so in possession of another.

And the case of Omar v. Soper, 18 Pac. Rep., 446 (which we presently analyze), is relied on to support this doctrine. The California case of Haven v. Haws, from which we have just quoted, is a complete reply to this position, for it holds that:

"A qualified pre-emptor, intending at the time of

settlement to take the whole of a quarter section of land, can initiate a valid claim to the whole, by performing acts of settlement on one-half, while the other half is enclosed and cultivated by another person."

If such pre-emptor can stand outside of the first settler's enclosure and perform acts which will give him title as against the first occupant, *a fortiori*, he could acquire a good title if he were only called upon to enter the land at the Land Office, and not make any settlement whatsoever upon the ground.

The case of Omar v. Soper, 18 Pac. Rep., 446, relied on by defendant's counsel as supporting their contention that if we were not permitted to *come on the land* and acquire title that we could not acquire title by staying off the land, is, as to the main question, strongly confirmatory of our position, in that, by giving protection to the mineral claimant only "during the period named"—that is, the sixty days prescribed by the Colorado Statute—it is perfectly clear that except for the Colorado Statute no protection would have been afforded the first claimant, as the protection was expressly limited to the period prescribed by the Statute. But the case is clearly not applicable here, as the facts there *showed a mineral discovery* by the first claimant, and the protection referred to by the Colorado Statute was to prevent invasion during the time allowed to perfect his claim under the local Statute by sinking a shaft a given depth, as that Statute required; and the statement in such decision concerning one not being permitted "to stand outside" the claim and "initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances," was very properly used, but its significance was merely this: Under the Colorado law the locator of a mining claim had to sink a shaft within sixty days *after his discovery* and his failure so to do resulted in the forfeiture of his claim. During that sixty days,

the claim was held to be "appropriated" ground and not open to exploration or location by others, and any attempted location thereof by others during such period would be void. The court very properly held that this doctrine not only applied to one who went within the boundaries of such location during such sixty days and made his discovery and sunk his shaft, but it also applied to one who located an overlapping claim covering the major portion of the first location, but who made his location and sunk his shaft just "outside such appropriated territory" in the hope that the locator of the first claim might fail to sink his shaft within the prescribed sixty days and that this circumstance would render valid such overlapping location.

The decision rests upon the doctrine that *after the discovery of mineral*, and the marking of the boundaries, the original claim was "*appropriated* territory" and not subject to acquisition either by proceedings *on* or *off* the claim.

The case has no bearing upon the situation here where the mineral claimant's occupancy *rests upon no mineral discovery, and does not appropriate the land*, and where the adverse party by compliance with an appropriate Statute has acquired the complete equitable title.

It is clear therefore that the doctrine of Omar v. Soper, when properly analyzed, is a strong case in support of our view that without some special statutory protection,—which does not exist in these cases,—the general law affords no protection to exclusive occupancy of the public domain by mineral claimants *without a mineral discovery*, but, independent of this, we have shown the case to be inapplicable and not to sustain the point to which it is cited, but even if it did, it is in clear conflict with the above California au-

thority, which undoubtedly correctly states the true rule.

This case of Haven v. Haws was subsequently reaffirmed in Whitaker v. Pendola, 78 Cal., 296; and in Kitts v. Austin, 83 Cal., 167.

The case of Quinby v. Conlan, 104 U. S., 420, 423, is relied upon by the Circuit Court of Appeals and by our opponents, as holding that a *peaceable entry* by one intending to enter land under the pre-emption law, cannot be made upon the prior possession of another, even though the first settler has no rights in the premises.

We admit that certain language used in such decision, when taken alone, would seem to sustain this conclusion; but when the facts of the case are carefully examined, it will be found that the case *decided* the very contrary. The facts there, were as follows: In 1865 Conlan entered into possession of the lands in question with the intention of pre-empting them; the land was not then surveyed, but was surveyed in February, 1868, and plat filed in April, 1868; in May, 1868, Conlan, who had remained in possession, filed in the Land Office his declaratory statement under the pre-emption law. In May, 1869, four years after Conlan's settlement, and one year after the filing of his declaratory statement, Quinby settled upon the land, and in November, 1871, filed his declaratory statement under the pre-emption act. It seemed that Quinby relied upon his having purchased the improvements of the settler who occupied the land when Conlan settled upon it, his theory being that on account of such settlement prior to Conlan's, Conlan acquired no rights, and that he, Quinby, by his purchase from such first settler, acquired a better right than Conlan. The court, however, held that Quinby acquired no rights by his pur-

chase of the improvements from the first settler, and that his own settlement alone would be considered, and that he must be considered as having settled upon the land "with notice of plaintiff's (Conlan's) prior claim, by his declaratory statement, filed in the Land Office the year before."

In that case Conlan had complied with the law, which made good his prior settlement, as against Quinby's subsequent settlement; that is within the time allowed by law, after survey of the land, he had made his record entry—filed his declaratory statement; had he not done this, but had he waited to do so, until after Quinby had filed his declaratory statement, the court would have given judgment for Quinby, despite Conlan's prior settlement, for the same reason that the court sustained Conlan's right to be on the land, notwithstanding the prior settlement of the party whose improvements Quinby bought. This is the clear inference from the following language of the court:

"Had such parties [the settlers prior to Conlan] followed up their occupation and improvements by a declaratory statement, when the public surveys were extended over the lands, the case would have been different."

This shows that the mere prior settlement alone, without compliance with the law, did not prevent Conlan's settlement; otherwise, Conlan could not have prevailed in the suit. Hence, it is apparent that the language in the opinion relied upon to sustain our adversaries' position, when read in the light of what was actually decided by the court, clearly sustains our contention.

While it is true that the court says:

"A settlement cannot be made upon public land already occupied, as against existing occupants, the set-

tlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decision in Atherton v. Fowler, 96 U. S., 513, and Hosmer v. Wallace, 97 U. S., 575," it is quite evident that this language has no reference to a peaceable settlement, but to such settlements as were mentioned in the cases cited, of Atherton v. Fowler and Hosmer v. Wallace; otherwise, the quotation is in conflict with the very point decided by the court.

The California case of Goodwin v. McCabe, 75 Cal. 584, relied upon by the Circuit Court of Appeals as prohibiting a peaceable entry upon the possession of another in order to found a homestead settlement, was disregarded in the subsequent cases of Whittaker v. Pendola, 78 Cal. 296 and Kitts v. Austin, 83 Cal. 167.

In Sparks v. Pierce, 115 U. S., 408-413, the Court, speaking through Justice Field, says:

"Mere occupancy of the public lands and improvements thereon give no vested rights therein as against the United States, and consequently not against any purchaser from them."

In Deffeback v. Hawke, 115 U. S., 392, the court says:

"There can be no color of title in an occupant who does not hold under any instrument, proceeding or law purporting to transfer to him the title, or to give to him the right of possession, and there can be no such thing as good faith in an adverse holding where the party knows that he has no title and that under the law, which he is presumed to know, he can acquire none by occupation."

Our opponents fail to recognize a clear distinction between the rights of a possessor of a mining claim against *mere intruders having no better title,* and that which exists as between such a possessor and *one connecting himself with a government title by proper*

proceedings to acquire the title to the land. As against the latter, the status of the possessor is the same as it would be against the Government itself, and he must be able to make practically the same showing that he would if the suit were under Section 2326 of the Revised Statutes to determine the rights of adverse claimants to mining locations. The obligations resting upon such a party are clearly set forth in Gwillim v. Donnellan, 115 U. S., 45, where the court says:

"To entitle the plaintiff to recover in this suit, therefore, it was incumbent on him to show that he was the owner of a valid and subsisting location of the lands in dispute, superior in right to that of the defendants. His location must be one which entitled him to possession against the United States as well as against another claimant. If it is not valid as against the one, it is not as against the other. The location is the plaintiff's title. If good, he can recover. If bad, he must be defeated. A location on account of the discovery of a vein or lode, can only be made by a discoverer, or one who claims under him. The discovered lode must lie within the limits of the location which is made by reason of it. * * * In this action the plaintiff must recover on the strength of his own title—not on the weakness of that of the adversary. The question to be settled by judicial determination, so far as he is concerned, is as to his own right of possession. He must establish a possessory title in himself, good as against everybody."

We insist that the doctrine contained in the above quoted language is applicable here as much as if we had a patent from the United States, as we have the complete equitable title to the land in question, if the same was subject to our selection.

"Mere occupancy of the public land does not of itself give any right to the land or prevent the Government from disposing of the land as it pleases."

Yosemite Valley case, 15 Wall., 86;

S. P. R. R. Co. v. Purcell, 77 Cal., 71.

"Unless a claim is sanctioned by law, and held and asserted in accordance with law, it has no existence as a substantive right."

Hutchins v. Low, 15 Wal., 86.

"Mere occupancy of the land, no matter how long continued, or how improved, gives no vested interest therein.

It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right as against the Government. The land remains subject to the absolute disposing power of Congress."

Frisbie v. Whitney, 9 Wall., 187;
People v. Shearer, 30 Cal., 650;
Hutton v. Frisbie, 37 Cal., 490.

The rights of entry-men, or claimants," are measured by the Act of Congress" which gives them. Rector v. Ashley and Frisbie v. Whitney, *supra*. The conditions of actual prior discovery and subsequent development work, were necessary, as the Court shows, in Chambers v. Harrington, 111 U. S. 530-533, because in former experience,

It was soon discovered that the same person would mark out many claims of discovery, and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this manner to exclude others. * * * Clearly the purpose was the same as in the matter of similar regulations by miners, namely: to require every person who asserted an exclusive right to his discovery or claim, to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

This has special bearing upon these cases as the bill shows that *this mining claim was one of those so reprehended*. The same persons, without discovery, sought to exclude others. It moreover appears by the report of the Committee of Mines and Mining, on Senate

Bill 5589, 57th Congress, that 103 persons, in the county wherein these lands lie, staked out 8248 placer oil claims of 20 acres, or an average of 1600 acres each. See copy in Division I■ appendix.

In closing our review of the opinion of the Circuit Court of Appeals, we call this Court's attention to the fact that such Court seems to misunderstand our claim as to the true meaning of "vacant land open to settlement," for they say: "The contention of appellant that the Act of Congress had reference only to vacant land open to settlement, *which appears upon the books of the land department*, cannot be sustained," whereas we have never claimed that the books of the land department show what land is "open to settlement," but only what land is "vacant," and the Court seems to reject our claim that "vacant lands" merely means "Those public lands which are unreserved and unappropriated, as shown by the records of the Land Office," because, says the Court: "Some of the richest mineral lands in the United States, which have been owned, occupied and developed by individuals and corporations for many years have never been patented. It would be absurd to say that such lands were vacant and open to settlement, because the books of the Land Department do not show that they have been settled upon." We never claimed such lands were "open to settlement." This reasoning of the Court overlooks or ignores altogether the meaning which we give to the words "open to settlement" in the statute, for it must be remembered that land to be selected under this act must be both "vacant"—i. e., not taken on the Land Office books—and must also be "open to settlement," and no land is open to settlement which is *known* to be valuable for mineral. It is therefore perfectly clear that the "richest mineral lands in the United States, owned,

occupied and developed by individuals and corporations for many years," &c., referred to by the Court, are fully protected from selection under this Act, because such lands are *known* mineral lands not "open to settlement," although they may be "vacant," that is, not taken on the land office books.

We have always admitted that land *known* to contain valuable mineral deposits, was not open to selection, under the Act of June 4, 1897, but we are not dealing with any such lands here, as the lands here involved were not known to be valuable for mineral when selected by complainant's predecessor in interest, and we have shown that subsequent discoveries of mineral on such lands cannot be considered as affecting the selector's title.

Having concluded our special review of the opinion of the Circuit Court of Appeals in these cases, as to the effect of the occupancy of mineral claimants before discovery of mineral, as against parties having better title, we will now proceed to examine in a more thorough and exhaustive way the meaning the word "vacant" has acquired, as used by Congress, the Land Department and the Courts, in referring to the public lands; and in advance, we wish to apologize to the Court for the great length, and the detailed exhaustiveness of our examination of this subject. The only excuse for so full, careful and extended an examination of this question as follows is that after an established use for a century, a new signification is attempted to be given the word "vacant," which has been sanctioned by a divided Circuit Court of Appeals in these cases—by the Secretary of the Interior in the Kern Oil Company case.

III.

"Vacant" lands as applied to public lands, from prior to the acquisition of a public domain by the United States, has in legislation always had the unvaried meaning of "subject to disposal"—subject to entry—not appropriated under the laws for disposal of the public domain—and has never had reference to the condition of the land as being occupied or unoccupied by persons who had acquired no right under the land laws to private appropriation of the land.

Preliminary to examination of the land laws of the United States it must be noticed that the terminology of the land laws had been in great measure fixed in the legislation and practice of the states prior to the acquisition of a national public domain. The delegates of the states owning public lands were familiar with the terms already in use in their State legislation and naturally imported into national laws their familiar terms. This is recognized and commented upon by this court in Chotard v. Pope [12 Wheat. 586-588] especially with respect to the word "entry" which has not in the public land laws the signification of assertion of possessory right by entry *into or upon the land itself*, but merely the *obtaining of a record in the proper office* of a purchase, or individual appropriation of public land under the law for its disposal.

In like manner the word "vacant" land had in State legislation, the above indicated meaning of "subject to entry;" not approriated or disposed of, nor reserved; subject to disposal under the land laws. It was used in that sense in the North Carolina public land act of 1786 as is shown in the opinion in Blunt's Lessee v.

Smith [7 Wheat. 274], in legislation of Maryland in 1781 [174 U. S. 234] and of Pennsylvania in 1792 [6 Pet. 749] and in 1755 [1 Yeates 517], in South Carolina in 1784 [2 McCord. 358]; Virginia in 1779 [2 Wash. 61]; and doubtless in others of the original states. It naturally was adopted and used by Congress in its already acquired sense when the national public domain was acquired from the states, and Congress was called upon to legislate respecting it. Congress simply adopted the terminology with which its members were familiar as lawyers and legislators in the states. It acquired the terminology with the land.

In statutory construction words are construed in the light (1) of the established interpretation of all general laws in force upon the same subject; (2) of their construction in executive administration of such laws; and in legislation for a department, words are presumed to be used in the same sense they have acquired by prior use in such department in its administration of similar laws; (3) of judicial interpretation, and if they have a well understood meaning by judicial interpretation it is presumed they are used in that sense.

We have thus three lines of enquiry for interpretation of the word "vacant" in the act of June 4, 1897.

1. VACANT LAND IN ACTS OF CONGRESS.

"Vacant" land is used in not less than forty-five public land acts by Congress prior to that of June 4, 1897, in many of which its use excludes the meaning of "unoccupied" and in none is it clearly used in that sense; its use is conjoined with "subject to entry," unappropriated, and like words, and conversely to appropriated, claimed, entered, granted, located, private land, purchased, reserved, taken and similar words. It means subject to entry and refers to the land office record condition of the land.

Reference to all acts found by counsel, using the words "vacant land" is made in footnote.* Some of these acts are neutral and do not show *in themselves* that the word is used in such restricted sense, excluding that of unoccupied, but in such statutes its use is harmonious with that meaning. The first use of "vacant land" by the Congress of the United States was

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*Note. April 1, 1790, 1 Stat. 106-107; June 1, 1796, Sec. 4, 1 Stat. 490-491; March 2, 1799, Sec. 2, 1 Stat. 724; Sec. 7, May 1, 1802, 2 Stat. 180; Sec. 4, March 3, 1805, 2 Stat. 344; Secs. 1 and 2, April 18, 1806, 2 Stat. 381-382; Sec. 2, April 21, 1806, 2 Stat. 395; Sec. 2, April 25, 1808, 2 Stat. 502-503; Sec. 5, February 15, 1811, 2 Stat. 617-619; Sec. 5, March 3, 1811, 2 Stat. 662-663; Sec. 2, April 23, 1812, 2 Stat. 710-711; Sec. 5, March 3, 1813, 2 Stat. 812-815; Sec. 2, April 27, 1816, 3 Stat. 307; Sec. 1, March 1, 1817, 3 Stat. 347; Sec. 2, May 11, 1820, 3 Stat. 572; Sec. 1, February 28, 1823, 3 Stat. 729; Sec. 1, January 19, 1824, 6 Stat. 292; Sec. 1, May 18, 1824, 6 Stat. 304; Secs. 1, 2 and 3, May 26, 1824, 4 Stat. 65-66; Sec. 1, April 17, 1828, 4 Stat. 263; Sec. 2, May 29, 1830, 6 Stat. 437; Sec. 2, March 2, 1831, 4 Stat. 451-452; June 15, 1832, 4 Stat. 534; Sec. 1, July 14, 1832, 6 Stat. 524; Sec. 1, June 28, 1836, 6 Stat. 646; February 26, 1839, 5 Stat. 365; Sec. 1, February 18, 1841, 5 Stat. 412-413; Secs. 1 and 4, June 15, 1844, 9

in the act of April 2, 1790 [1 Stat. 106], which in the preamble states that Congress had

repeatedly and earnestly recommended to the respective states in the Union, claiming or owning *vacant* western territory to make cessions of part of the same.

The object of acquiring vacant land was to enable Congress to pay the debt incurred in the war for independence and to reward the soldiers for their service. The act shows that the vacant territory ceded, contained inhabitants and roads. It saved grants by the ceding state, and entries, locations, and rights of persons "settled on and occupying lands." It was not with reference to the *condition of non-occupancy* of the ceded land, but to its *disposability for discharge of public obligations* that the word "vacant" was used. The act is significant—though there was then no United States Land Office or office records, for by the act the lands were acquired and with the land came terminology of the land laws. Chotard v. Pope, *supra.*

The act of June 1, 1796, sec. 2 [1 Stat. 490], subjected the military bounty land reservation *unlocated* by January 11, 1800, to entry like "other *vacant* territory." That of March 3, 1805, sec. 4 [2 Stat. 344] provided for resurvey of *confirmed "grants"* when necessary to ascertain "the adjacent *vacant lands.*" That of April 18, 1806 [2 Stat. 381-2] was "to settle the claims to the *vacant* and unappropriated

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Stat. 791-792; Secs. 7, 9 and 10, September 26, 1850, 9 Stat. 469, 471, 472; Sec. 2, January 25, 1853, 10 Stat. 745; Sec. 1, March 3, 1853, 10 Stat. 256; Sec. 1, March 3, 1857, 11 Stat. 251; Sec. 6, June 21, 1860, 12 Stat. 71-72; Sec. 1, March 3, 1873, 17 Stat. 607, now R. S. 2347 and 2348; Sec. 1, March 3, 1873, 17 Stat. 634-635; Sec. 2, March 3, 1877, 19 Stat. 392; Sec. 1, March 3, 1877, 19 Stat. 395; Sec. 1, June 15, 1878, 20 Stat. 133; Sec. 1, June 9, 1880, 21 Stat. 171-172; Sec. 2, March 3, 1883, 22 Stat. 484; Sec. 1, October 1, 1890, 26 Stat. 647; Sec. 2, January 12, 1891, 26 Stat. 712; Sec. 1, June 3, 1896, 29 Stat. 197; June 4, 1897, 30 Stat. 36; June 6, 1900, 31 Stat. 614; March 3, 1901, 31 Stat. 1037;—in all, 48 Statutes.

lands," *"occupied"* by claimants under grants by Tennessee and by North Carolina after her cession of 1790. The acts to settle titles in the old French settlements and grants, continually use vacant as the converse to granted. See acts: April 25, 1808, sec. 2 [2 Stat. 502-3]; February 15, 1811, sec. 6 [2 Stat. 617 619]; March 3, 1811, [2 Stat. 662-3]; April 23, 1812, [2 Stat. 710-711]; March 3, 1813 [2 Stat. 812-815]; May 11, 1820, sec. 2 [3 Stat. 572]; June 15, 1832 [4 Stat. 534].

That for St. Louis and other towns, May 26, 1824 [4 Stat. 65-6], fixed a limitation for proof of claimants' possession prior to December 20, 1803, and required them to get and to furnish the surveyor general a certificate of such fact "to serve as his guide in distinguishing the *private* lots from the *vacant* lots set apart for the support of schools. By this act of 1824 all lands not occupied prior to the Louisiana Purchase, December 20, 1803,—twenty-one years before—were *vacant whether occupied or not.* So also all lots in Ste. Sault Marie, were, by the act of September 26, 1850 [9 Stat. 469], classed as vacant if not occupied by the claimant prior to January 1, 1849.

The act of April 27, 1816 [3 Stat. 307], required local land officers to select *"vacant"* lands as indemnit for schools lands lost in place, which they could only do from their *records.*

That of March 1, 1817 [3 Stat. 347], authorized reservation for use of the navy, or "vacant" land bearing live oak or red cedar timber. No one would contend that an unauthorized occupancy would prevent the government from reservation of its own lands for its own use. That of March 3, 1853 [10 Stat. 256, now 2446, R. S.], allowed correction of a settler's erroneous entry to cover the land he had *"settled* on and improved if the same then be vacant." Here is land

settled on, *occupied* and improved by one seeking to appropriate it to himself, which may still be *"vacant"* and which he cannot take unless it is *vacant*, thus showing that "vacant" has no reference to occupancy.

The acts of March 3, 1857 [11 Stat. 251], and March 3, 1877 [19 Stat. 395], confirmed State lists of selections of swamp lands "so far as the same remain *vacant and not interfered with by an actual settlement* under any existing law of the *United States.*"

Clearly Congress did not understand that that land ceased to be vacant by an actual settlement and occupancy, without authority of law. The act of March 3, 1873 [17 Stat. 607, R. S. 2347], gave a preference right to enter *vacant* coal land *occupied* by the claimant. The act of March 3, 1873 [17 Stat. 607], allows entry of *"vacant"* coal land *occupied* and opened by the applicant.

The act of June 15, 1878 [20 Stat. 133], forfeited part of a railroad grant and restored to entry "all *vacant*, unappropriated land heretofore withdrawn," giving a preference right to *"all settlers now residing* upon said [vacant] lands" and "right to make the final proof now required by law and receive patents at the expiration of five years from the date of their actual settlement."

If they had *occupied* this *vacant* land for five years as actual settlers they could under this act prove up at once.

The act of March 3, 1883 [22 Stat. 484], provided that:

Registers and Receivers shall, upon application furnish plats or diagrams of townships, in their respective districts, showing what lands are *vacant and what lands are taken*, etc.

This is an act now in force, for guidance of local land officers and it classes all lands as either vacant or

taken, *as determined by the office records alone*, as registers and receivers can only speak from their records.

The act of June 3, 1896 [29 Stat. 197], but a year and a day prior to that of June 4, 1897, in question, provides that:

this act shall not apply to commutations and homestead entries on which final certificates have been issued and which have been heretofore canceled, WHERE THE LANDS MADE VACANT BY SUCH CANCELLATION *have been re-entered* under the homestead law.

Here the mere cancellation of a land office record entry makes land "*vacant*" without reference to its *occupancy*.

The four last cited acts, all of recent date, show so clearly the sense in which "vacant" is used, as to exclude candid contention by any intelligent person that vacant can be interpreted to mean unoccupied.

Two other matters require notice here. When asked to allow the Baca heirs to move a location made under the act of June 21, 1860 [12 Stat. 71-2], limiting the right to "vacant lands not mineral," Congress allowed it June 11, 1864 [13 Stat. 125], with an amendment limiting them to "public lands *unoccupied* and not mineral," instead of "vacant land not mineral." This amendment, changing "vacant" to "unoccupied," *ex industria* implies that vacant did not, in the opinion of Congress, mean *un*occupied, or the change would not have been made. The reason for the change is found in the history of New Mexico. Previous to 1862 there was no law for settlement on unsurveyed lands or for acquiring public land in New Mexico, except the donation of act of July 22, 1854 [10 Stat. 308].

Spanish and Mexican grants were in course of determination and confirmation and were reserved from any disposal until final action upon such claims. In-

dian hostilities made the donation act ineffective by preventing compliance with its requirements of settlement before January 1, 1858, four years cultivation, and survey and designation of boundaries within three months. In 1864 Indian hostilities had been in some measure repressed and settlement had been made on unsurveyed public land, and to protect them the second Baca act, *supra*, allowing change of a former location, amended the act to read "Unoccupied" instead of vacant.

Another fact is that when Congress means for some special reason to confine entries to unoccupied or uninhabited lands it says so, as in the act of July 17, 1854 [10 Stat. 304], for location of Chippewa half-breed scrip upon "unoccupied" lands, and "uninhabited" land in the Timber and Stone act of June 3, 1878 [20 Stat. 89], and in the act of July 1, 1898 [30 Stat. 620], it designated:

> Public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry.

The act of June 3, 1896, *supra*, brings the use of "vacant" in public land legislation from its inception to the year prior to the act in question. Examination leaves no room for doubt that Congress has always used it to indicate land not reserved, granted or taken under the public land laws, i. e., land subject to disposal under those laws.

2. "VACANT" LANDS AS USED BY LAND DEPARTMENT.

The departmental construction and use of vacant from the organization of the Land Department has given to "vacant the "meaning of subject to entry, not reserved, granted or taken, subject to disposal under the land laws, not as meaning "unoccupied."

(a) The word "vacant" as construed in Land Office General Circular.

The last General Circular, July 11, 1899, of the land office containing instruction to local officers and information to the public, page 6 says: "if the tract is *vacant* and subject to entry applied for, the register will so certify to the receiver." Again, page 3: "Any proper information regarding *vacant* lands may be obtained by application at any of the land offices." As the land officers can only speak from their records, "vacant" in both these cases necessarily refers to the record condition of the land, and has no reference to its occupancy. And again, page 6: "Military bounty land warrants may be located upon any *vacant* public lands of the United States that are subject to sale at private entry," and it has never been held that the location of military bounty land warrants was confined to *unoccupied* lands. On pages 181 and 182 of such circular the statute of March 3, '83, is quoted, making it the duty of the Register and Receiver to furnish plats and diagrams "showing what lands are *vacant* and what lands are *taken*." Sec. 2372, Revised Statutes, in certain cases of mistake in entries authorizes the Commissioner of the land office

to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, *if unsold, but if sold,* to any other tract *liable to entry.*

This is set out, and page 136, General Land Office Circular, says:

A change of entry, when allowed, will be made from the tract erroneously entered to that intended to be entered, *if vacant,* but if *not vacant* the change may be made to any other tract liable to entry.

This clearly, in the language of the land department, makes *vacant* the synonym of *unsold,* and *not vacant* that of *sold.*

This General Circular is simply a reissue from time to time, as changes of land laws make necessary, of the long established rules and instructions to local officers and the public, regulating disposals of public lands. These will show that vacant has been thus used, in this sense *from the organization of the land office* to the present time.

(b) The word "vacant," as construed in the annual reports of the Commissioner of of the General Land Office and the Secretary of the Interior, to Congress.

The annual reports to Congress of the General Land Office have always used "vacant" as the converse of taken or appropriated of record, meaning those lands to which no right had attached of record under existing laws.

As sustaining this view we quote from the Annual Report of the Commissioner of the General Land Office for the fiscal year ending June 30, 1900, page 20:

"VACANT PUBLIC LANDS, with AREA RESERVED AND APPROPRIATED.

"Reports have been received from various Land Offices giving an approximate estimate of the quantity of *vacant public lands*, together with the *area reserved and appropriated* in the several land districts at the close of the fiscal year ending June 30, 1900, of which the following is presented as a recapitulation:

State or Territory	Area unappropriated and unreserved.			Area Reserved	Area Appropriated.
	Surveyed	Unsurveyed	Total		
Alabama	Acres 359,250	Acres ———	Acres 359,250	Acres 53,880	Acres 32,244,790

(Here follows a tabulation of all the States and Territories in a similar manner.)

Certainly since 1892, and doubtless for many years prior thereto, the classification has been the same, *the area of the unappropriated and unreserved lands, as shown by the books and records of the Land Offices,* all come under the head of and are classified as "VACANT PUBLIC LANDS." See Report of 1892, pp. 43 and 44; Report of 1893, p. 50; Report of 1894, p. 72; Report of 1895, p. 66; Report of 1896, p. 17; Report of 1897, p. 17; Report of 1898, pp. 17 and 18; Report of 1899, p. 16.

An examination of the reports cited will show a unanimity of classification of *lands not reserved or appropriated on the books of the various land offices as "vacant public lands"* that can only be the result of a well understood meaning of the term, and this is especially true when we remember that different men make up the different reports.

We direct particular attention to the fact, that by way of explanation, the Commissioner in each of the reports cited, states that he is reporting three things, viz: 1.—VACANT PUBLIC LANDS; 2.—AREA OF LANDS RESERVED; 3.—AREA OF APPROPRIATED LANDS. And he further explains that the recapitulation is made up from the reports of the

local land officers, in the various land offices; and it must therefore follow from this statement of the author of the reports, that the classification of all *lands shown by the record of the various land offices to be unappropriated and unreserved, as vacant public lands,* is made without regard to, or knowledge of their occupation or possession.

And again, in the "DETAILED STATEMENTS," in the report of the Commissioner quoted from pp. 158 and 159, (annual report, 1900), he says:

"The following tables are based on reports furnished by the District Land Offices, and are arranged to show * * * the area of unappropriated and unreserved public lands, surveyed and unsurveyed; the area of lands reserved; the area of lands appropriated, and the total area of each County or part of County in the respective Land Districts, *to which is added a brief description of the character of the vacant lands.*"

Turning to the tables referred to [pp. 160-209], we find that "a brief description of the character of *vacant lands*" is given *only of unreserved and unappropriated* lands of a county, and if a county is all appropriated and reserved, we find under the caption: "Brief description of character of *unappropriated and unreserved lands,*" and in the column devoted to "description," the words: *"No vacant public land."*

See page 160 to 209, upon every one of which, with seven exceptions, appears the language *"no vacant public land"* from once to half a dozen times on each page, and always as meaning "unappropriated and unreserved" on the land office records. An examination of the annual Reports of the Land Office for a great many years back, shows the same use of "vacant" in this connection.

Again on page 159 of said report [for 1900], the Commissioner says:

"If the area relieved from appropriation by cancel-

lation of entries, filings or selections, should exceed the area entered, selected or filed upon, there should be a decrease in the area of *appropriated* lands, and a *corresponding increase* in the area of *vacant* lands."

An examination of the same table in each of the other reports cited by us, will show the same use of the terms, "unappropriated and unreserved lands," and "vacant lands," and the same classification. Hence, it is too clear for controversy that the words "vacant land," as used by the Land Department for many years past, are synonymous with the words "unappropriated and unreserved lands," and used interchangeably therewith, and refer *only* to the condition of the land *as shown by the records of the Land Office.* Manifestly the terms have no reference to any *occupation* or possession of the lands, as this could not be furnished by the Register and Receiver, as they can speak only from their records.

The court's special attention is called to page 194 of the annual report of the Commissioner of the General Land Office for 1896—the last report filed before the passage of the Act here in question, and which report contains the Land Department's draft of the Act here in question, together with a letter recommending its adoption. On such page 194, under the heading "Recapitulation of *Vacant* Lands in the Public Land States and Territories," the total area of the *unreserved* and *unappropriated* public lands are given, and this area corresponds exactly with the number of acres of land *"unappropriated and unreserved,"* as shown by counties on the two preceding pages.

We submit that these annual reports of the Land Department, covering a long series of years, made to Congress itself, for the purpose of informing and advising Congress of the progress of that Department in the administration of the public land laws—having

used the word "vacant" uniformly and without exception, as the equivalent of "unappropriated and unreserved" of record, and as meaning "open to entry of record," that Congress in using the word "vacant" in this statute, could not have intended to give such word an entirely different meaning from that which it had acquired by years of use in the Department which drafted this law and which was to administer it.

This is essentially true in this case, as this statute, as we have stated, was prepared and drafted by the Land Department itself, and the word "vacant" is inserted therein by the Land Department, and used in the established sense in which that Department had always used it.

See pp. 72-75, especially Section 8 on page 74, Annual Report of Commissioner of General Land Office for 1896, where draft of this act is set out, being in the language as subsequently passed by Congress.

And to emphasize our point that the act was drawn, having in mind the accurate and established technical meaning of the words used, we call the Court's attention to the language used by the Commissioner of the General Land Office, in his letter, enclosing to the Secretary of the Interior, his redraft of this very bill, where, on page 71 [Annual Report of 1896], the Commissioner says:

"Furthermore, the technicalities and other difficulties which have heretofore been experienced in construing and administering many of the public land laws, have demonstrated the *necessity of exercising great care* TO AVOID ALL OBSCURE PHRASEOLOGY IN LEGISLATION OF THIS NATURE. * * * I have accordingly prepared and respectfully submit herewith, for your consideration the draft of a bill, as a proposed substitute for the one submitted."

Then follows the bill here under consideration, in which "to avoid obscure phraseology," the word "va-

cant," with its established technical meaning of "open to entry" is used.

Nothing could be plainer than that Congress by using this word, intended to adopt its land office meaning.

This brings the case directly within the reasons laid down by this Court for giving great consideration to the Land Department's *established interpretation* of public land statutes.

In Midway Co. v. Eaton, 182 U. S., 602, this Court, through Mr. Justice McKenna, says:

"One of the reasons [for following the land office construction of an act] is that the officers of the Land Department may have recommended the statute—*indeed may have written its words*, or at any rate, were familiar with the circumstances which induced the legislation."

Under these circumstances the Land Office interpretation of the word "vacant," will be treated as binding upon Congress and the courts.

(c) The meaning of "vacant lands" as fixed by the adjudicated decisions of the Land Department.

Meaning of "vacant coal lands."

We call attention to the Coal Land Act, Sections 2347 to 2352 of the Revised Statutes. By the provisions of this act, parties are allowed to enter "*vacant* coal lands of the United States not otherwise appropriated or reserved by competent authority," etc. Here Congress is defining what lands may be entered under this act, just as under the Act of June 4, 1897, it is defining what lands were subject to selection, and we call attention to the fact that during the twenty-eight years of operations under the Coal Land Act, not a

decision is to be found holding that mere *occupancy* of coal lands prevents them being *"vacant* coal lands" or prevents their entry under the Coal Land Act. Congress, in using the word "vacant" in that Act, never intended to exclude from coal land entry valuable coal lands, merely because some one was *occupying* such lands without any rights therein. Why should Congress have intentionally excluded from coal land entry, lands in the mere occupancy of parties "having no thought of acquiring title?" Such an occupancy did not operate to appropriate the lands, or to give any rights thereto, or as an impediment to their disposition by Congress. Why then curtail and *pro tanto* defeat the object and purpose of the act by excluding such lands from disposal? Congress had no idea of doing so, and the word "vacant" in the act has never been so construed, during the more than quarter century of operations under it. That such a construction would so obviously defeat the plain purpose and object of the act, probably accounts for this construction never having been even claimed for it, in all these years; and every reason for excluding such an interpretation for the word "vacant," in that act applies with even greater force here, where the Government, for *its own benefit*, is seeking exchanges of its lands, for those which it desires to acquire.

It is perfectly evident from the departmental regulations under the coal land law, that mere prior possession of another, offers no impediment to entries under such law, or to the full compliance with the terms thereof.

Attention is called to Rule 20 of such regulations 1 L. D., 687, and the recent circular re-issued January 22, 1901, which rule in part is as follows:

> "A *mere possession*, without satisfactory improvements, will not secure the tract to the *prior occupant*, when a subsequent claimant shows *his full compliance with the law.*"

This is the Departmental construction of an act which allows only "vacant" land to be entered. It recognizes that there may be a "compliance with the law," notwithstanding the land is "occupied" by another, and is a holding that "mere possession" of the "first occupant" does not prevent the land being "vacant."

This ruling is judicially confirmed in Lezeart v. Dunker, 4 L. D., 96, wherein it is decided (see syllabus):

> "No rights are acquired (under the Coal Land Act) by virtue of alleged prior possession as against adverse claimants who filed within the statutory period."

Thus holding that land, though "occupied," was "vacant," and subject to filing under the Coal Land Statute, and corroborating our view that "vacant" has no reference to "occupancy" of the land.

See Brennan v. Hume, 10 L. D., 160, and Muller v. Coleman, 18 L. D., 394, where the first discoverer of coal gets the right of entry, notwithstanding the occupancy by an actual prospector or homestead claimant.

Rule 24 of the Coal Land Regulations provides that:

"The Register, *if the tract is vacant*, will so certify to the Receiver," etc., and as the Register can only speak from his records, of course, this means that the land is "vacant" if shown to be so of record.

When it is admitted that the word "vacant" in the coal land laws means "not taken of record," it must be admitted that the same meaning attaches to that word when used in the Act of June 4, 1897, and espe-

cially when the Land Department allows any number of coal land filings on the same tract of land, irrespective of prior occupation and extensive improvements.

We respectfully submit that the Coal Land Act is practically identical with the one here under consideration, and that under it the word "vacant" has *never* been construed as "synonymous with the word 'unoccupied'." To do so would have frustrated the whole purpose of the act, as it would have permitted mere "occupancy" without right, to withdraw all lands from the operation of the act, just as a similar construction of the Act of June 4, 1897, would prevent all exchanges of forest reserve lands by the mere "occupancy" of parties who have no rights as against the Government, or those claiming under it, and whose occupancy is not respected by the Government in any of its dealings with its lands.

March 3, 1891, [26 Stat. 1095-1101] Congress granted right of way over public lands for irrigation purposes, the applicant being required to prepare and file a map and obtain approval of the Secretary of the Interior. The special instructions are published, 18 Land Decisions, 168; paragraph 11 provides:

> The applicant shall mark each of the subdivisions affected "v" or *"vacant," if it belongs to the public domain* at the time of filing the map in the local office; and the same must be certified by the Register. If it does not affirmatively appear that some portion of the public domain is affected, the local officers will refuse the maps.

A like worded regulation was made under the similar Act of January 21, 1895 [28 Stat. 635], 20 Land Decisions, 166; and 27 L. D., 205; *ib.* 497; *ib.* 666;respecting railroad rights of way and paragraph 22, *ib.* 668, requires that:

When the maps are filed the local officers will note in pencil on the tract books opposite *each vacant tract* traversed, that right of way for a railroad or station grounds is pending, giving date of filing and name of company.

It is perfectly clear from this use of the word "vacant" that the Department is referring to the record condition of the land, and not to its occupancy, and if it is shown of record to be part of the public domain, it is "vacant," regardless of its *occupancy*.

March 26, 1883, Secretary Teller gave instructions to the Commissioner of the General Land Office, relative to encolsure of tracts of *vacant* Osage Indian lands *and their occupancy* for grazing purposes. He says, 2 L. D. 638:

I need not advise you that enclosures of the character described are unauthorized and illegal, or that settlement on such lands is limited to 160 acres, or that *such mere occupancy* is trespass only, and *gives no right to the occupant*, or that such occupation does not legally exclude *bona fide* settlement by another. Such trespass on the public land is equally offensive to law and to morals, as if upon private property, and LANDS NOT LEGALLY APPROPRIATED ARE VACANT and subject to disposal to whomsoever legally applies for them.

That *"vacant"* has no reference to *occupancy* in land office nomenclature could not be made clearer.

In Osborne v. Haws, 1 L. D. 406, the Secretary says:

Haws' claim was, at that date [the date of Havens' filing] invalid and of no legal force. The tract was, therefore, *vacant public land*, subject to the claim of Havens, or whoever else might appropriate it.

Here the Department was dealing with land that was occupied by Haws, yet designates it as "vacant public land," because it had not been legally taken or appropriated of record.

In Goyne v. Mahoney, 2 L. D. 576-8, Goyne was in possession of one tract, and had erroneously made entry for other land. Mahoney made entry for the land so in Goyne's possession, and Goyne afterward sought to amend his entry to cover his possession. The Secretary held that:

> "Mahoney's entry, made long prior to the application to amend, and when the tract was *vacant* and unappropriated (although occupied by Goyne in good faith), must take precedence."

Farmers' Canal Co., 13 L. D. 167-9, holds that *because* a certain tract was covered *by entry of record* it was not *"vacant land."*

In Neal v. McMullin, 16 L. D. 296-299, the land had been located under a land warrant in 1857, but minuted on the Land Office records upon the wrong land, and for apparent want of contiguity the entry was canceled in 1860. In 1861 the error was brought to light and the local officers "were directed to examine *their books and plats*, and if the above described tracts were found to be *vacant*" to restore the entry—showing that *the records of the Land Office alone* determine as to whether or not land is *"vacant."*

In Swanson v. Galbraith, 21 L. D., 109-111, it is held that the cancellation of an entry of record "leaves the land unappropriated, *vacant* and subject to entry." This emphasizes the fact that it is the record condition that determines whether or not the land is vacant, and not the fact of its occupancy or non-occupancy.

In the recent case of Thompson v. Holroyd, 29 L. D., 362, Holroyd made pre-emption filing on the tract in question and submitted final proof; his entry was contested by Thompson alleging prior possession and occupancy of the land and valuable improvements thereon at the time of Holroyd's entry; the testimony showed that Thompson took possession, claiming and

intending to enter under the Desert Land Act two years before Holroyd made his first filing, but that he, Thompson, did not make application to enter in the local land office until after Holroyd's filing. Thompson had enclosed a portion of the premises, built a cabin and constructed an irrigating ditch, which reclaimed about twenty acres of land, on which hay was grown. Holroyd knew of these facts, and that Thompson had leased the land to a son of Holroyd, who was in possession when Holroyd made his pre-emption filing and settled upon the land. Thompson invoked the doctrine of Atherton v. Fowler; the Department, however, held that:

> "The doctrine of the case of Atherton v. Fowler [96 U. S., 513], does not extend to the present case * * * The evidence * * * shows that whatever invasion there was upon the premises occupied by Thompson through his tenant, was but an entry made upon the unlawful possession of another with a view to initiate a claim thereto, the land being *vacant* public land, subject to pre-emption."

It was further held that as Thompson did not hold the land under "claim or color of title," he "was a mere trespasser thereon," and that his enclosure and possession was unlawful under the Act of Feby. 25, 1885 [23 Stat. 321].

We call attention to the fact that the Department, in the above case, held land to be "vacant public land," notwithstanding the occupancy there involved was of a great deal more substantial and dignified character than a mere nomadic occupancy referred to in the excerpt from Tarpey v. Madsen, quoted in the opinion of the Department in Kern Oil Co. v. Clarke, 30 L. D., 550, and which was held in such opinion to prevent the land being vacant, as such word is used in the Act of June 4, 1897.

These two holdings cannot be reconciled, unless we consider the sentence immediately preceding the Department's quotation from Tarpey v. Madsen as controlling the words quoted. We think they are reconcilable by so doing, but if not, we submit that the holding in Thompson v. Holroyd is in accord with the weight of authority and is in harmony with the construction of the Act of June 4, 1897, contained in the case of F. A. Hyde, 28 L. D., 284, where the Department says:

"The only limitation as to kind or condition of lands subject to lieu selection thereunder [the Act of June 4, 1897] is contained in the words 'vacant land open to settlement.' This language is so clear and explicit, as to leave no room for construction. *'Vacant land open to settlement' is any public land to which rights may be initiated by settlement under existing laws.*"

This is the natural, and, we insist, the correct construction of this language.

That rights to public lands may be "initiated by settlement under existing laws," provided such settlement can be peaceably made, notwithstanding the occupancy and improvements of persons who have acquired no lawful rights thereto, the following Departmental decisions are conclusive:

In the case of Ayers v. Annis, 13 L. D., 225, Annis had made a settlement on the land involved long before Ayers sought to initiate rights in and to the land. Annis had filed a declaratory statement as required by the law and resided on the land continuously, and extensively improved it, but failed to file on the land within the time allowed by law after the plat of survey had been filed. The Department held:

> "The occupancy and possession of one who does not make his filing within the time allowed by law does not exclude the land from a subsequent entry by a qualified entryman."

Ayers, the subsequent entryman, was granted the land.

In the case of Keller v. Bullington, 11 L. D., 142, a homestead was filed by Bullington on a tract of land upon which Keller and others were working a very valuable stone quarry. Such quarry had been in possession of and had been worked for many months prior to the entry of Bullington, but Keller and others had not attempted to acquire title thereto from the Government. They relied upon their possession and occupancy. Held:

> "Such an occupancy and possession confers no right or title as against the United States, or against those having a valid claim of title under its laws. An occupant of the public land, claiming title by virtue of his possession as against an adverse claimant, must show that he occupies and holds the same under some proceeding or law purporting to give him, at least, a right of possession. The homestead entry must stand."

An illegal possession or one without a compliance with the law, will not defeat a homestead entryman's right to enter the land and receive patent therefor.

Hull v. Stove, 16 L. D., 202.

The rights of a claimant of a portion of the public lands must be measured by the Act of Congress, and if a sound construction of that Act shows that he had no vested right or interest in the land, he must be governed by that Act, whether the terms be hard or lenient.

Rector v. Ashley, 6 Wall 142;
Jefferson Davenport, 16 L. D. 526.

In the case of Farris v. Mitchell, 11 L. D., 300, a settlement had been made on the land involved long prior to the making of the timber culture entry, and the settler had built thereon a good and substantial

house and was living upon the land when the timber culture entry was made, but had allowed the time for the placing an entry of record to go by without making a filing. The timber culture entry was contested by the one who relied upon the possession and occupancy of the settler to defeat the entry. Held:

> "The occupancy and possession of one who had failed to place his claim of record within the time allowed by law cannot defeat the right to enter the land by any qualified entryman who does comply with the law. * * * This has been the uniform ruling of the Department for a long time [citing many cases] and applies to timber culture entries as well as to homestead entries." [Citing many cases].

In the case of Streeter v. Rolph, 21 L. D., 10, Streeter settled on the land involved in 1871, and lived thereon with his family and cultivated and improved the same continuously until May 23, 1881, ten years, when Rolph made timber culture on the land. Streeter had never placed his claim of record in any manner. Held:

> "The mere occupancy and possession of Streeter, who did not take steps within the time allowed by law to place his claim of record, did not preclude the making of the entry by Rolph. Though a great hardship is worked upon Streeter, the timber culture entry must be held intact and the land patented to Rolph.
>
> "I am not aware of any law or decision that holds a homestead entry to be invalid, because the tract covered thereby was, at the date of such entry, in the illegal possession of another party."
>
> Coon v. Freel Heirs, 16 L. D. 202.

In the case of Summers v. Eagle, 20 L. D. 550, Summers was an actual settler living on the land involved, for a period of five years prior to the entry of Eagle, under the homestead law, and was actually

living on the land at the date of the homestead entry, but had allowed the time for making his entry of record to pass, without taking any steps to protect his rights under the act of May 14, 1880. Held:

> "It is sufficient to say that Summers' five years occupancy of the land did not prevent others from making entry thereof, and that being public land, it was subject to entry by the first qualified applicant, which in this case was Eagle."

No other doctrine of the law is better settled. See:

Head v. Roberts, 28 L. D. 86;
Mills v. Daly, 17 L. D. 345;
Prewit v. Skeens, 12 L. D. 629;
Watts v. Forsyth, 5 L. D. 624;
Watts v. Forsyth, 6 L. D. 306;
Christiansen v. Mathern, 7 L. D. 537;
Burrus v. Cantrel, 15 L. D. 398;
Wachter v. Southerland, 7 L. D. 165;
Huntsborger v. Eickman, 16 L. D. 271.

Of the innumerable cases of contest between mineral and agricultural claimants that have come before the Land Department, *not one can be found in which the prior possession of a mineral claimant has been held material.* It is not even a *factor* in the controversy, and the question always turns upon the *character of the land,* regardless of the priority of possession.

In cases not arising under statutes containing the word vacant, the Department, in published decisions, *more than an hundred in number,* has consistently and invariably ruled that land not held by an entry of record, or under a claim of right, validly initiated in compliance with the land laws, is vacant land, and that title thereto may be initiated by settlement and entry under existing laws. Even if rights are initiated by settlement and improvement under the public

land laws with intent and for the purpose of acquiring title under such laws—but the settler, or claimant, fails *to advance from an intention, existing only in his mind, to a formal record declaration by filing an entry in the local land office* of which all others can take notice, within the time allowed by law, *neither his acts of settlement nor his intention avail.* The land is *vacant* notwithstanding an actual occupancy so validly initiated, and is subject to appropriation by the first legal applicant.

In such a case, Powers v. Forbes, 7 Copp's Landowner, 149, the Secretary of the Interior held that:

> His failure to make entry left the land subject to Forbes' entry, after which he was an *occupant* only of the public lands, without any valid claim, and had no more right to the tract than if he had never claimed any, because his continued occupancy was unauthorized by any law providing for the disposal of the public lands. * * * The continued illegal possession of the tract by McManus could not, therefore, defeat the entry of Forbes; but at the date of such entry the tract was under the law *vacant public lands subject thereto,* although it was then *occupied* and improved by McManus.

It is the settled rule of the Department in many decisions that lands in actual occupancy, even initiated under the land laws and with intent to acquire the land, if no right has been acquired, are *vacant, notwithstanding such occupancy* and are subject to entry by another.

Thompson v. Holroyd, 29 Land Decisions, 362, 364; Osborne v. Havens, 1 L. D. 405, 406; Goyne v. Mahoney, 2 L. D. 576, 578; Michael McVey 1 L. D. 37; Burrus v. Cantrel, 15 L. D. 397; Neal v. McMullin, 16 L. D. 296, 299; even if the land is occupied by a settler with right; no formal entry having been made,

an entry is allowed and is canceled only after a hearing and proof of the prior right.

Show v. Bretzke, 20 L. D. 72.

The same rule obtains in cases of occupancy by mineral claimants having recorded mining locations, but no entry or mineral application. To lands in such occupancy settlement rights may attach and entries be made and carried to patent.

Where settlement rights initiate to lands so occupied by a miner or a prospector, and where a non-mineral entry is made of such lands, the entry is never canceled for such fact, but only on proof at a hearing that the land is of mineral character.

In the language of the Land Office, it is only the record that speaks. It is the existence of, or the want of, an apparently valid claim of appropriation of land of record, that makes it *not vacant* or *vacant*. Price v. Missouri, Kansas and Texas Ry. Co., 13 L. D. 167, 169.

Such examples might be given in indefinite numbers, showing that in the language of the Land Department, relating to the subject of legistation covered by the Act of June 4, 1897, "vacant" has no reference to the condition of land as to *occupancy*, but applies technically to the condition of the land as to lawful appropriation under the public land laws, and especially to its record condition on the land office books and plats.

In a report upon the public lands and their water supply by Professor Newell of the Geological Survey, compiled partly from information furnished by the Land Department, published in 1895, which was before Congress in 1897, lands to which no claim appeared of record, were designated as "vacant," and on page 510, it is explained that *"vacant"* is a techni-

cal, legal term meaning not taken of record, and not referring to occupation of the land.

On August 7, 1882, the House Committee of Congress on public lands—shortly after the decision of Atherton v. Fowler, while the subject of unlawful occupancy of the public domain was being aggitated and the passage of the act of Feb. 25, 1885, to prevent such occupation was being urged upon Congress—in its report upon the then pending bill, said:

> "In the State of California, and in others of the States and Territories, many ranchers or herders have settled on the public lands without claim or pretense, or title or possessory rights, and have enclosed large tracts of the same with fences. Such lands, if *vacant* and *unoccupied*, would be eagerly sought for homestead and pre-emption purposes. But the fact of their *occupation*, so unlawful—though, in legal contemplation, *they are vacant and subject to homestead entry and pre-emption entry*—deters the settlers from making entry thereon."

The Public Domain, 1853, page 1169.

It is thus clear that the Land Department, in administration of the land laws, has, consistently with the legislative branch of the Government, used vacant in the technical sense of indicating the condition of land as to rightful appropriation initiated under the land laws, especially as to its record condition in that respect, and *without reference to occupancy not coupled with rights so initiated.*

The Act of May 14, 1880, Sec. 3, (21 Stat. 140) as affecting this controversy.

The Land Department, in Kern Oil Company v. Clarke, 30 L. D. 550-567, has held that Sec. 3 of the Act of May 14, 1880, giving to homestead settlers the same time after settlement (ninety days) to put their claims of record, as is allowed to pre-emption settlers, is of importance in this controversy.

On the other hand, we maintain that such law has no bearing on this controversy—*first*, because here there was no occupancy of a homestead claimant, and we are not confronted with the settlement rights of such a claimant before record entry, and, *second*, even if there were such a settlement in this case, and the law in question was applicable as against a *purchaser* or *grantee* of the Government—such as a selector under the act in question is—the doctrine is well settled that even if land is occupied by a homestead settler, with intention of making entry, as allowed by the Act of May 14, 1880, that such settlement does not appropriate the land, or prevent it being settled upon, or entered by another, but the second settler may make entry, subject to be defeated, however, should the first settler, within ninety days after settlement, apply to enter the land, and contest the prior entry, and at a hearing, show his prior settlement. The prior settlement only gives a preference right of entry, but until such right is exercised, it in no way excludes the land from settlement or entry by another; and, *third*, the Act of May 14, 1880, has been construed to apply only as between parties *whose title rests upon and matures through settlement*, but not as against grantees or purchasers from the Government, whose title does not

rest upon or mature through settlement; in which latter case the record alone controls. See

Oregon & Cal. R. R. Co. v. Miller, 30 L. D. 51;
L. C. Russell, 30 L. D. 490;
N. P. R. R. Co. v. Colburn, 164 U. S. 383, 386;
Camfield v. United States, 167 U. S. 518;
Tarpey v. Madsen, 178 U. S. 215.

In the last case this Court says:

> "Any controversy between two occupants of a tract open to pre-emption entry is not determined by the mere time of the filing of the respective claims in the Land Office, but by the fact of prior occupancy; and these controversies are of frequent cognizance. Oral evidence, therefore of the date of occupancy may be decisive of the controversy *between such individual applicants* for a tract of public land, but by decisions of this court running back to 1882, as between a railroad company holding a land grant and an individual entryman, the question of right has been declared *to rest not on the mere matter of occupancy, but upon the state of the record.*"

3. The judicial use and interpretation of the word vacant by the United States Supreme Court has been to give it the same signification in respect to public lands as is given by the legislative and executive departments.

This will appear in both Federal and State decisions, and in cases relating to public lands whether arising upon statutes using the word vacant, or those not doing so. It cannot but be noticed that vacant is used conversely to, and as the autonym of, granted, entered, taken, reserved, etc., under the land laws.

Kissell v. St. Louis Schools, 18 How. 19, arose un-

der the Act of May 26, 1824 [4 Stat. 65] giving the vacant lots to school purposes. Kissell claimed under an entry by Duncan. The Court say:

> The entry was contested, and was brought to the consideration of the Commissioner of the General Land Office, and upon August 1, 1845, he instructed the Register and Receiver that only 8.20 acres was *vacant* at that spot; the residue of the 35.49 acres surveyed as fractional section 26 had been located on private claims.

Here "vacant" is used as the converse of "located on private claims."

The Act of March 3, 1857, [11 Stat. 251], confirmed swamp land lists, so far as (1) the same remain vacant, *and* (2) not interfered with by an actual settlement under any existing law.

In Martin v. Marks, 97 U. S. 347, the court held that:

> The approval of them and the issue of patents to the state were mere ministerial acts in regard to which that department had no discretion, unless it was found (1) that the lands were not *vacant, or* (2) *had been actually settled on* adversely to the swamp land claim.

Here, necessarily, "not vacant" describes a condition of land, entirely different from land "actually settled on."

In 1789 North Carolina, by legislative act, provided for reservation of Salt Licks in her western territory and for disposal of others as vacant land. The validity of an entry of a salt lick came in controversy in Edward's lessee v. Darby, 12 Wheat. 206, and this court, *ib.* 211-12, said:

> The 2nd section of the act of 1789 [N. Car.] directs that * * * all other salt licks and springs with the adjoining lands, not deemed by the [County] court fit for the manufacturing of salt be and they are hereby declared *vacant* land

> and liable to be located and entered in the same manner as other vacant land. * * * We can discover no other law of North Carolina or of Tennessee, which subjects the reservation about any of the licks deemed fit for manufacturing salt, to appropriation and survey as *vacant* land.

Here, obviously, "vacant" had no reference to occupancy, but merely meant land subject to *location* and *entry*.

In cases not arising on statutes using "vacant" the judicial understanding and use of vacant is not less significant. Taylor v. Brown (5 Cr. 242);

> The warrant is an authority to, and an injunction on, the surveyor to lay off 2000 acres of *vacant* land which had not been surveyed by order of council and patented subsequent to the proclamation. * * * (P. 249). His warrant only authorized him to acquire *vacant* land and he took upon himself to find lands of that description * * * (P. 253). It is not for him to say that he had misinformed the Government, and had surveyed *appropriated* instead of *vacant* lands.

See footnote on page — showing that a survey accompanied and was part of every entry, so that vacant meant unentered.

Taylor v. Meyers (7 Wheat. 26):

> The case states that it has been customary ever since the year 1799 to withdraw surveys after they have been recorded. The place surveyed had, of course, been considered as having again become *vacant*, and has been appropriated by other warrants, which have been surveyed and carried into grant.

Jackson v. Clark (1 Pet. 635):

> A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government, and the *vacant* lands constituted the only certain fund for its discharge. * * * P. 639. In that case [Taylor v. Myers, *supra*,] the owner

had openly abandoned his location and survey, and had placed his warrant on other land. In such case the land was universally considered as returning to the mass of *vacant* land and becoming like other *vacant* land *subject to appropriation.*

United States v. Percheman (7 Pet. 51):

The United States had acquired a territory containing near 30,000,000 acres, of which 3,000,000 had probably been granted to individuals. The demands of the treasury and the settlement of the territory required that the *vacant lands should be brought into market.*

United States v. Clarke (8 Pet., 465):

The object of this law cannot be doubted. It was to separate *private property* from the public domain, for the double purpose of doing justice to individuals, and enabling Congress safely *to sell the vacant lands* in their newly acquired territories.

Here "vacant land" means public land subject to disposition.

United States v. Seton (10 Pet., 312):

On an inspection of the whole record we are of opinion that the title of the petitioner is valid to the 520 acres surveyed at the place called for by the *grant* and not valid as to the 15,630 acres, but that his title is valid to 15,480 acres of *vacant land* which he has a right to have surveyed adjoining the said survey of 520 acres.

United States v. Sibbald [10 Pet., 309].

That such was not the intention of the governor is evident from the evidence of Mr. Fernandez, who testifies that on ascertaining that part of the island had been previously *granted*, he informed the governor, who gave Sibbald the right to *locate* his grant at any *vacant* place, suitable for the erection of a saw-mill.

Here "vacant" is used as the converse of "granted."

United States v. Kingsley [12 Pet., 479].

An order had been made by the governor limiting the time to six months from October 27, 1818, within which all *grants and concessions* of lands made on condition for mechanical works, to wit: factories, sawmills, etc., were to *revert* to the class of *vacant lands,* and *be declared vacant.*

Here, obviously, "vacant" has no reference to *occupancy,* but is descriptive of public land freed from "grant" or "concession."

In Erhardt v. Boaro, 1 Bus., 538, the Court said:

> The bill sets forth the discovery * * * on vacant, unoccupied land of the United States, of the outcrop of a vein or lode, etc.

Obviously, to the pleader and to the Judge, Field, writing the opinion, "vacant, unoccupied," was not mere tautology—but vacant had one signification and unoccupied another.

We have already shown, in subdivision II of this brief, that this Court, in Belk v. Maegher, 104 U. S. 42, in speaking of the possession of Belk, under a premature mining location, said: "He had no right of possession. * * * " **He "had no such location as** prevented the land being IN LAW VACANT." Here this Court declares land is *"in law vacant"* though in fact *occupied* by a mineral claimant—the same character of occupancy as the defendants here rely upon, as preventing these lands being vacant.

In the Spanish, Mexican and French colonial systems, vacant had the same meaning, and citations to decisions of this Court arising from such laws are given in footnote,* to which reference may be made, if desired.

***NOTE—Subzett v. Lapice, 8 How. 48-67; Haydel v. Dufresne, 17 How. 28-30; Savignac v. Garrison, 18 How. 136-7; New Orleans v. United States, 10 Pet. 711-715, 722: Fremont v. United States, 17 How. 542-554; United States v. Coe. 170 U. S. 682; Hays v. United States, 175 U. S. 248-255; Chaves v. United States, 175 U. S. 552-556.**

The above citations show that vacant, in the understanding of this Court, designated merely lands subject to disposal under the general land laws—land subject to entry.

Another line of decisions of this Court, not using the word "vacant," is equally conclusive as to what constitutes vacant land.

If vacant means unoccupied, and by occupancy without intent to acquire title under the land laws, another is precluded from entry, then, obviously, occupancy alone gives a right in the land whereby it may be held indefinitely, permanently, from entry. The Government would thereby be deprived of its lands by a mere trespasser.

On the contrary, this Court has invariably held that settlement on unoffered land, even with intent to make an entry when the land is offered, is by mere license, and gives no right, and that the Government may make any disposal of such land that it chooses to do. Yosemite Valley Case, 15 Wall. 86; Sparks v. Pierce, 115 U.S. 408, 413; Buxton v. Traver, 130 U.S. 232; Frisbie v. Whitney, 9 Wall. 187. After a survey and opening of the land to settlement, a right is acquired by settlement, but that right is limited in time, and is not an appropriation of the land, even for the brief time allowed for making entry. But, even during such time, the land may be settled upon and entered by others; subject, however, to be defeated by the first settler asserting his rights within the time allowed for his entry, in a contest which he initiates and in which he carries the burden of proof. It is a preference right only, and has no effect to withdraw the land from entry or other grant, unless the preference right is exercised within the time limited. It is also a mere license, but coupled with a preference for brief time.

Tarpey v. Madsen, 178 U. S. 215, 220-1, 225.

The necessary effect of these doctrines is that mere occupancy of public lands not initiated under the land laws does not prevent them from being vacant.

4. The same use of vacant occurred in earlier state legislation and state decisions.

The Original Colonies in some cases had such legislation as Pennsylvania in 1755, [1 Yeats Pa. 517] and on declaring their independence, found themselves possessed of public domain by the rights of the crown or of the colonial proprietors, or confiscation of lands of royalists. Pressed by the necessities of war, laws were enacted by the states for disposal of "vacant," or ungranted, land by sales and as military bounties. Such laws were enacted by Maryland in 1781 and 1788 [174 U. S. 234], by North Carolina in 1786 [7 Wheat 274], Virginia in 1779 [2 Wash. Va. 54], Pennsylvania, 1792 [6 Pet. 749], South Carolina, 1784 [2 McCord 358] and probably by others of the states. The State Courts use vacant in the sense of not granted, disposable.

In North Carolina, in Trustees of University v. Sawyer [1 Taylor, N. Car. 114], the Court held:

> The officers authorized by the Government to sell and convey *vacant lands which had never been appropriated by any grant,* have sold and conveyed lands which have been thus appropriated. To this their power did not extend, and consequently all such sales and grants are void.

In State v. Guano Co., 22 S. Car. 50, the Court says:

> The beds of such channels [navigable water] are not held by the state simply *as vacant lands, subject to grant to settlers in the usual way, through the Land Office.*
>
> Thomas v. Daniel, 2 McCord S. Car. 358.

What, however, is the language of the Act of 1784? It is entitled an act for establishing the mode and conditions of surveying and granting the *vacant* lands within this state its object is general, it refers to every part of the state, and only *vacant* land is to be surveyed and granted. *Land appropriated by the Legislature is not vacant*, be that appropriation what it may; to individuals, to public purposes or to Cherokees.

Burnsides v. Reid, 2 Washington (Va.) 54, 61;

This act of 1779, establishes the right of prior settlers and gives pre-emption, when *vacant* lands are to be found adjoining. Though in that case the settlement was Mazes, yet the adjoining lands, which *would otherwise have been for pre-emption, were not vacant, having been surveyed by Hamilton under the authority of the Greenbrier Company anterior to the act of* 1779. This Court therefore considered that Maze had a right to his settlement, and Hamilton having a prior right to that, under the law of 1779, was entitled to the remainder of his patent, and so determined it, with liberty to Maze to survey his pre-emption wheresoever else he could find vacant lands.

Preston v. Bower, 6 Mumf. Va. 271.

(Note—We call attention in note later, that in early **times lands were only surveyed as entered and** that surveyed land usually signified entered land.)

The surveys in question, having been made in May, 1774, were liable to be entered as *vacant* in December, 1809, unless they were returned to the Land Office.

Reingald v. Malott, 1 H. & J. Md. 299, 317.

As between the proprietary and a person who takes out a common warrant, such a person acquires a right to have his warrant *located on any vacant land* in the county, to the surveyor of which the warrant is directed, it being the inception of

> the contract between the proprietary and such person for so much *vacant* land as is expressed in the warrant. * * *

Jackson v. Ogden [7 Johns, N. Y. 238], decided by Chancellor Kent, is one of the leading cases among American judicial decisions most often cited as authority upon the subject of surveys, frequently cited by this court. The land there in question had been occupied many years but was adjudged to be vacant. The reported case shows that:

> Edmund Weed testified that the land *in possession* of defendants was *a vacant lot* * * * * *Kent, C. J.* The courses and distances do not correspond with the map, and no doubt there is a . . *vacant piece of ground* lying between lots No. 15 and 16, provided these lots be located according to the courses and distances actually run and the monuments actually established in the original survey made before the issuing of the patents. * * * The next owner of Lot No. 16 was Freeman, whose title commenced in 1795, and he said the land *which defendant was on was a vacant lot.*

Following the older States, the newer ones adopted their terminology and sense in which they used vacant.

Hastings v. Stevenson, 2 Ohio 6.

> It has, however, been settled by the Supreme Court of the United States in Wilson v. Mason that a survey not founded on an entry is a void act, and constitutes no title whatever, and that consequently the land so surveyed remains *vacant and liable to be appropriated* by any person holding a land warrant.

In Meyer v. McCullough, 1 Ind. 341, a military bounty land warrant was located, and a mistake made by the Register in transferring the entry from the location book. The Court says:

> In consequence of this mistake the said quarter

section of land which the complainant had located, appeared on the books as *vacant* and as being for sale.

Smith v. Jones, 3 Sneed (Tenn.) 533, 635.

There is proof in the record tending to show that through this last mentioned tract called to adjoin the former so as to make the northern line of the one and the south line of the other a common boundary, yet that when actually surveyed *a strip of vacant land* was left between them.

(Note—It must be remembered that in the older states, the colonies and parts of Ohio, Kentucky and Tennessee, before the uniform system of Hamiltonian surveys was adopted, every *entry* was separately and specially surveyed. A survey accompanied an entry, and was part of making an entry, so that *vacant* was sometimes used as converse to *surveyed*, the implication being that surveyed land was entered or granted, disposed of.)

In the earlier states judicial decisions using vacant are numerous. The foregoing are merely *some of very many* that might be cited. They are especially numerous in Tennessee and Kentucky, owing to the irregularity of their systems of surveys.

Jasper v. Quarles, Hardin, Ky. 469, [1805-8, upon an act of 1797]:

If a grant had actually issued before the first act of improving, with an intention of appropriation, manifested and continued according to law, then, no such improving or settling could give claim because not upon *vacant* land. But if vacant at the time of such improvement, when the services are rendered and completed according to the statutes, the whole performance shall be taken together, and the claim must relate to the incipient act.

Marshall v. Bompart, 18 Mo., 84-87.

> There can be no difficulty in ascertaining what was meant by the term vacant lands. In the common understanding, all the public lands are considered vacant. The sense of that word, amongst our people, is the same as it was under the Spanish government. *The word vacant, when applied to lands, means those which have not been appropriated by individuals.*

In the light of the next decision below, by the same Court, "appropriated" was here evidently used in its technical legal sense as meaning a *legal* appropriation, not a mere *defacto* appropriation.

Tigh v. Choquette, 21 Mo., 233-236.

> *If there was a squatter on the land, that would not prevent them from considering it as vacant. Public land, on which a settler is seated without authority of law, is, nevertheless, regarded as vacant.*

Citations might be indefinitely multiplied, but could add nothing to the conclusiveness of the demonstration that from the beginning of the United States land system, and land laws, and theretofore in the states, vacant has always signified not entered, and subject to entry—the record condition of the land.

The only excuse for so full, careful and extended an examination of this question, is that after an established use for more than a century, a new signification is attempted to be given, and has been sanctioned by a divided Circuit Court of Appeals; and by the Secretary of the Interior, in Baca Float No. 3, 29 L. D., 44 and 30 L. D., 105; and in Kern Oil Co. v. Clarke, 30 L. D. 550, and same on Review, 31 L. D., 288.

The Position of the Secretary of the Interior in the Kern Oil Company Case (30 L. D., 568) that our Construction of the Statute Makes "Vacant" a "Meaningless" Word, and that "Open to Settlement" Refers to the Condition of the Land as Shown by the Land Office Records.

In response to our argument that the word "vacant" means not taken on the Land Office records, and that the phrase "open to settlement" refers to the conditions on the ground, not shown by the Land Office records, the Secretary of the Interior in the Kern Oil Co. case (30 L. D., 568) says, that to so hold makes the word "vacant" "meaningless." We will admit that if the statute read "vacant *and* open to settlement," it might be necessary to hunt for some special meaning for the word "vacant" not trenched upon by the meaning we have given to the words "open to settlement." But the statute reads "vacant land open to settlement," *i. e.* "vacant land [which is] open to settlement."

It was not the intention of Congress to permit *all* "vacant land"—*i. e.*, all lands not taken of record—to be selected under the act of June 4, 1897, for *some* "vacant lands" contain known valuable mineral deposits, which fact might not be shown upon the land office records; and to reserve such lands, it was necessary to add to the words "vacant land" the limiting and qualifying words "open to settlement," as lands containing known valuable mineral deposits are not "open to settlement." This purpose was therefore fully accomplished by restricting selections to "vacant land [which is] open to settlement." When it is seen that the phrase "vacant land" is a more comprehensive term than "vacant land [which is] open to settlement," and includes both mineral and non-mineral lands, the necessity of using also the limiting phrase, "open to settlement," in addition to the term "vacant land," is at once apparent, otherwise no protection would have been given by the act, *to known mineral lands or valid possessory rights under valid mining locations.*

It is perfectly clear that in this statute the phrase "open to settlement" is used as a *qualifier* of the words "vacant land," as the lands which are "open to settlement" are but a *portion* of the "vacant lands" of the Government, as that term has always been used by the Land Department; and when this is borne in mind the necessity of giving a new or special meaning to the word "vacant" completely disappears, and the argument based upon this necessity falls to the ground.

The Secretary in the Kern Oil Company case (p. 568) says that the phrase "open to settlement" "fully and more appropriately applies to that condition," meaning the Land Office record condition of lands, and that "vacant" refers to the "occupancy" of lands. We submit that to accept this definition of these terms would leave entirely without protection all known valuable mineral lands and all valid mining locations, unless some one happened to be *occupying* such lands. A moment's consideration will demonstrate that this result would follow, for if "open to settlement" means, as the Secretary declares, "not taken of record," and if "vacant" means, as he declares, "unoccupied," where have we any language in the act which excludes from selection, or gives protection to, known valuable mineral lands or valid mining locations which are unoccupied? Any construction of this statute which makes the protection of the mineral claimant's title depend upon his occupancy—which the law in no wise exacts of him—instead of upon his compliance with the mining laws—*i. e.*, his making discovery of mineral and marking the boundaries of his claim—must be rejected, if any other reasonable interpretation of the law can be found, which will, without doing violence to the language used, give protection to all interests which it is the policy of the law to protect. We submit that our interpretation of the statute does this by protecting—under the meaning of the word "vacant"—every interest of record, and —under the meaning of the phrase "open to settlement"—every valid lawful interest not of record, which it is the policy of the Government to protect, whereas the Secretary's construction of the phrase *gives* protection to mere occupancy not entitled to protection under the law and *excludes* from protection valuable mining interests clearly entitled to protection under the law.

Shaw v. Kellogg, 470 U. S. 332, and the Baca Float No. 3, 29 L. D. 44, as justifying "vacant" being used to mean unoccupied.

The construction in Baca Float No. 3, *supra*, was administrative only, and not upon argument between adversary parties. That construction and that in Kern Oil Co. v. Clarke, *supra*, were based solely upon a dictum in the opinion of this Court in Shaw v. Kellogg, 170 U. S., 332 wherein it was said:

> "The Baca heirs were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant."

This seeming construction of vacant as meaning unoccupied is the first and only expression of this Court giving such definition to the word. Examination of the issue presented for decision shows that this question was not before the Court, or involved in the contentions, it was called upon to determine. No controversy existed upon that question, as it was not claimed that the location was invalid because of a prior occupancy of any part of the land. *The sole matter presented was whether a mineral discovery, made after selection and location of the lands covered by the grant, would defeat it.*

It was therefore a dictum, and not authority for the Courts or the Land Department. In a similar instance this Court, in Wisconsin R. R. Co. v. Pierce County [133 U. S. 496, 508] held:

> After the decision of the Court in the Leavenworth case, the Land Department changed its practice. * * * *But that decision did not warrant the change.* The question in that case was not, for what deficiencies indemnity could be had, but what lands could be taken for deficiencies which existed. If what was then said indicated that deficiencies which could be supplied

were limited to such as might arise after the passage of the act, *it was a mere dictum, not essential to the decision, and therefore not authoritative and binding.* The refusal of the Land Department therefore to allow the deficiencies was erroneous.

To ascertain and carry out the legislative intent, as evidenced by the language used, is the object of all rules of statutory construction, but in reaching such intent a meaning subsequently given such language can not be considered.

The meaning placed upon a word by a Court, after the passage of an act of Congress containing such word, cannot in anywise be deemed to have affected the legislative intent in using such word, and such later meaning given by the Court gives no aid in reaching the meaning of Congress in using such word.

We are here seeking the correct meaning of the word "vacant" in the Act of June 4, 1897, and to reach that meaning, the primary thing to determine is what did Congress intend by its use? And authorities on this subject, of which Congress could not have had any knowledge when it passed the act—as for instance, decisions subsequently rendered—can not throw any light upon the meaning of the word in such act. Such subsequently rendered decisions, however, are the only authorities relied upon here to defeat our construction of this word.

On June 4, 1897, when this Act was passed, Congress will not be presumed to have known that this Court, on May 22, 1898—the next year—would, in the case of Shaw v. Kellogg, casually state that "vacant land" meant "land not occupied by others," or that the

Land Department, in the Baca Float case, in an equally casual way, would do likewise two years afterwards, on July 25, 1899.

While foresight in legislation is most desirable, still, in arriving at the intent of Congress in passing an Act, Congress is not chargeable with *prophetic knowledge* as to what meaning will or will not be placed upon its language, *in some future decision.*

We wish to emphasize the fact that neither Shaw v. Kellogg, nor Baca Float case, can be of any service in enabling the Court to arrive at the legislative *intent* in using the word "vacant" in the Act of June 4, 1897, *and that such cases should not even be considered in trying to ascertain the meaning that Congress intended should be given that word.* This being so—and we do not think it can be disputed—then such cases have no bearing upon the *legislative intent* in the use of such word by Congress. They were *subsequently* decided and therefore throw no light upon the main question to be determined, viz: *What was the legislative intent?*

To determine *this,* is the chief purpose of all rules of statutory construction. When the legislative *intent* is ascertained, it must be given effect, regardless of all other rules of construction, as all other rules are subordinate to this controlling rule. In reaching the legislative intent, it is entirely proper to take into consideration, and to presume that the legislative body has knowledge of the meaning that *had already been given* by Congress, the Courts and the Land Department to any word which it is using that is descriptive of the public domain, and to presume that *such* meaning was adopted by the use of such word; but it would be entirely improper to suppose that Congress would presume that by some *future* decision, *the already established meaning of a word would be changed.* The presumptions are all in favor of stability and continuity

of judicial holdings and definitions. In view of this consideration, we submit that in construing this law, the chance expression used in Shaw v. Kellogg, decided *after* this act was passed, to the effect that "vacant" lands must be lands "not occupied by others," should not be even considered as against the long line of Court decisions, Acts of Congress and Departmental circulars, reports and decisions, in which a different interpretation had been placed upon that word *before* the passage of this Act.

In Re Clerkship of Circuit Court, 90 Fed. 251, Judge Sanborn said:

> "We must not lose sight of the fact that the sole object to be sought in the interpretation of the law, is the *intention of the legislative body* which enacted it, and that rules of construction are only serviceable as they assist us to obtain that object."

To the same effect, see article on Statutory Construction, Vol. 1, Fed. Stats. Annotated, page 23.

In the last named authority, on page 24, it is said that:

> "The true rule is that statutes are to be construed as they were intended to be understood, *when they were passed.*"

Citing Schuyler v. Thompson, 98 U. S., 172, where Mr. Justice Hunt says:

> "The *after wisdom* obtained by unfortunate results cannot justly be applied to their interpretation."

And in Platt v. N. P. R. Co., 99 U. S., 48, Justice Strong of this Court said:

> "The law concedes that in construing the Act of Congress of 1862, we are to look at the state of things *then existing*, and *in the light then appearing*, seek for the purposes and object of Congress in using the language they did, and we are to give such construction to that language, if possible, as will carry out the Congressional intention."

We submit that the foregoing is a clear and correct statement of the rules of statutory construction governing this controversy, and that in reaching the intention of Congress in using the word "vacant" in this statute, we can only consider the meaning that *had been* given to such words by the courts, *"when the statute was passed,"* and that the "after wisdom" derived from the casual use of that word in Shaw v. Kellogg, and in the Baca Float case cannot justly be applied to its interpretation;" and that we must consider the words *"in the light then appearing"* and therefore reference cannot be had to subsequently decided cases, to throw any light upon the intention of Congress in using the word.

The Department, in Kern Oil Co. v. Clarke, *supra*, held:

> Under established rules of construction, the word (vacant), in the Act of 1897, must be given its primary or ordinary meaning, unless the subject-matter or language of the act clearly shows that it was intended to be understood as referring only to the status of land as shown by the Land Office records, or unless to give it its primary or ordinary meaning would lead to incongruous or absurd results.

To apply this rule to the last of a long series of Statutes upon the same general subject, is so crass that it would be just ground for suspicion of the integrity of its motive, did not the long and well merited public confidence in the probity of the public lands administration exclude its being regarded as anything but a surprising blunder.

Such jurists as Marshall, Taney, Waite, Field, Miller, Catron, Wayne, Baldwin and Shiras of this Court; Kent of New York, Washington of Virginia, and others whose opinions have been above cited well understood "vacant" as applied to Public Lands, to be a technical word indicating unappropriated, grantable

public lands. It remained for the Secretary of the Interior in these late days too discover that it must be **taken in its "ordinary sense" and means land unoccupied.**

The rule as here stated by the Secretary of the Interior is not sanctioned, in a case like the present, by any respectable, well considered authority. It is the rule only as to statutes standing by themselves, isolated and unaffected by similar statutes upon the same general subject, or by special or technical uses of the words by the Legislature or Departments.

On the contrary, to the rule stated in Kern Oil Co. decision, *supra*, the rule is that:

When technical words appear in a statute —words having a special meaning in former legislation, departmental practice, or judicial decisions—they are to be taken in a technical or special sense unless it clearly appears that they are to be taken in the ordinary sense.

Sedgwick, Constr. Stat. & Const. L., 221, says:

> When technical words occur in a statute, they are to be taken in a technical sense, unless it appears that they were intended to be applied differently from their ordinary or legal acceptation. *ib.* 224. Words in common use, when found in a statute, are to be taken in their ordinary sense, and technical words in their technical sense, unless, as respects either a contrary intent plainly appears.
>
> P. 209. It is well settled, that in construing a doubtful statute, and for the purpose of arriving at the legislative intent, all acts on the same subject-matter are to be taken together and examined in order to arrive at the true result. "All acts *in pari materia*," said Lord Mansfield, "are to

be construed together as if they were one law." "Where," he said on another occasion, "there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they should be taken and construed together as one system, and as explanatory of each other."

Sutherland, Stats. & Statutory Constr., 1st Ed., 1891, says, Sec. 283:

> All consistent statutes which can stand together though executed at different dates, relating to the same subject, and hence briefly called statutes *in pari materia*, are treated prospectively and construed together as though they constituted one act. * * *
>
> Sec. 284. A statute must be construed with reference to the whole system of which it forms a part. * * *
>
> Sec. 255. * * * Where words have long been used in a technical sense and have been judicially construed to have a certain meaning, and have been adopted by the legislature as having a certain meaning prior to a particular statute in which they are used, the rule of construction requires that the words used in such statute should be construed according to the sense in which they have been so previously used, *though that sense may vary from the strict literal meaning of the words.*

Endlich Interp. Stats., 1st Ed. 1888, Par. 43, says:

> Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which they belong. * * *
>
> Sec. 74. * * * Where technical words are used in reference to a technical subject, they are primarily interpreted in the sense in which they are understood in the science, art, or business in

> which they are used. Thus upon subjects relating to courts and legal proceedings, the legislature may be presumed to speak technically unless, from the statute, a different use of the statute may be apparent.
>
> Sec. 2. The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical meaning, if they have acquired one, and in their popular meaning if they have not. * * *

The same doctrine is stated in Dwarvis on Statutes, pp. 701, 766.

In Reiche v. Smythe, 13 Wall., 162, 165, the court held that

> Congress having therefore defined the word in one act so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject when there is no language indicating an intention to produce such result? Both acts are *in pari materia*, and it will be presumed that if the same word is used in both and a special meaning were given it in the first act that it was intended that it should receive the same intepretation in the later act in the absence of anything to show a contrary intention.

In U. S. v. Patterson, 150 U. S. 65, referring to cases in which Court Commissioners were entitled to compensation, this Court said: "Words and phrases *of accepted meaning in legal phraseology*, must not, because they may be popularly used in a broader sense, be given, when found in the statute, that popular significance, so as to enlarge the matters in respect of which compensation has been authorized and may be awarded."

This rule of construction is applied also in Patterson v. Winn, 11 Wheat., 380, 392; United States v. Gilmore, 8 Wall. 330, 332; Brewer v. Blougher, 14 Pet. 178; Homer v. Collector, 1 Wall., 486; The Abbotsford, 98 U. S. 440, 444; and other cases.

The rule stated by the Secretary of the Interior in the Kern Oil Co. v. Clarke, *supra,* is therefore clearly erroneous.

The special meaning thus given in the land laws to vacant was more ancient than our American land systems. It had that meaning in Spanish land law. [Marshall v. Bompart, 18 Mo., *supra*]. The public domain 1883, pp. 1125, 1130; It was used similarly in the Canon law, as whether a church or benefice was vacant [2 Reeves Hist. Common Law; Hoffman's Legal Outlines, page 574], and applied to a fee of which there was no tenant, irrespective of the occupancy of the land [Hoffman's legal outlines, p. 500].

The result of this enquiry shows that the restricted or special use of vacant was a recognized one of long standing expressly recognized by Congress in the acts of June 15, 1878 [20 Stat., 133]; March 3, 1883 [22 Stat.484]; Oct.1,1890 [26 Stat. 647]; and June 3,1896 [29 Stat., 197], in none of which is the sense of "unoccupied" admissible. In such case it is contrary to the established rules of statutory construction to say the word must be construed in its primary and ordinary sense unless the contrary clearly appears. It must be construed *in the sense used in the former acts*—unless the contrary clearly appears.

It is, however, a primary rule of statutory construction that the legislative intent must control and all rules for construction are but means to that end. But Courts must, and do presume that a word which has had "a well understood meaning for more than *an hundred years*" is used in that sense in a subsequent statute, unless the contrary appears. The contrary does not appear in the statute. The next question is does it appear otherwise? viz: in the object of the law, the means to effect it, or in established public policy?

The object of the law—and means to effect it.

The act sought (1) to secure complete government control of the forest reserves by eliminating private ownership, and (2) to relieve those injured by inclusion of their property. *Neither object is promoted by excluding from selection eligible lands occupied by persons who had initiated no legal right to acquire them under the land laws.* Such a construction reduces the area and quality of land offered, renders selection uncertain and hazardous by liability to loss of the relinquished property and cost and delay of contest. It tends to defeat the object and to deter relinquishments with no advantage whatever either to the government or the selector.

It is not based upon a policy to protect mere occupants.

The offered right of selection in a proposal of the government to exchange its land for attainment of a public object. It never has given to mere occupants any rights to prevent its disposal of its lands for its own purposes. Frisbie v. Whitney, 9 Wall., 187; Yosemite Case, 15 Wall., 86; Lansdale v. Daniels, 100 U. S. 113; Gonsales v. French, 164 U. S. 338, 346; Buxton v. Traver, 130 U. S. 232; Whitney v. Taylor, 158 U. S. 85, 89; Northern Pacific R. R. Co. v. Colburn, 164 U. S. 383-86; Tarpey v. Madsen, 178 U. S. 215, 227. These authorities show that there is no such established policy, and, furthermore, that there is no moral obligation to protect such occupants.

The declared policy is to the contrary. The act of February 25, 1885 [23 Stat. 321] provided that,

> The assertion of a right to the exclusive use and occupancy of any part of the public domain of the

> United States, * * without claim or color of title, or asserted right * * as above specified as to enclosures,

is likewise unlawful and is prohibited.

The "above specified as to enclosure" is an exception in favor of those occupying public land *with view to acquiring title by entry*. There are two inhibitions: "enclosure," and "assertion of right to exclusive occupancy" without in good faith a view to their entry.

To construe the word vacant in the act of June 4, 1897, as evidence of intent to protect mere occupancy of land, therefore, contravenes a policy declared by statute, and also imputes to Congress the fatuity of depriving itself, without motive or legal or moral obligation, of free disposal of its lands, occupied without right, in exchange for those it seeks for public purposes to acquire.

3d. Nor can exclusion of such occupied lands be for the selector's protection.

The government owes him fair dealing but not guardianship. It need have no care about the occupancy, without right, of the lands it grants, but only for the title of that it gets. That secures its object. Every delay, formality, burden, requirement and difficulty imposed, that does not tend to protect the government from acquiring a bad title tends to defeat the object of the act.

There is then no conceivable reason to give vacant in the act a meaning other than that it has had throughout the whole period of our land system. All lines of inquiry converge to point to this fixed definition as the sense in which "vacant" was used and no reason appears for saying that the primary, or ordi-

nary, sense was intended in the last act. It must therefore be held that it was those lands which were subject to entry, (vacant) and not mineral (open to settlement) that were offered by the government to the forest reserve land owner as inducement to convey his property to the government in exchange therefor.

To hold otherwise is to ignore long established rules for statutory construction wherein we have a measure and know what they are, and to substitute for them the varying mood of an administrative officer, the Secretary of the Interior. Of all sciences the law most delights in precision of definition and fixity of meaning of words affecting rules of property and rights of the person. To waive aside such fixed rules of construction, and leave the definition of words long used to be disregarded at the discretion of an administrative officer, is, as said by Selden of the unlimited discretion claimed by the chancellors:

> "As if we adopt for a measure the chancellor's foot. One chancellor has a long foot; one has a short foot; another an indifferent foot. It is all the same with his conscience."

It is respectfully submitted that such revolutionary and unsanctioned methods of interpretation of statutes, rules of property, cannot be sanctioned and will not here obtain.

But at all events that change of construction should not obtain in the present case wherein the selection was made in 1899 before the new construction of vacant was pronounced in 1901. The construction of a law becomes a substantive part of it. The law of a contract at the time it is made is a part of the contract. A construction of law should not be changed to affect a contract previously made. McKean v. Delaney, 5 Cr., 22; Barnard v. Ashley, 18 How., 43, 45; United States v. Gilmore, 8 Wall., 330, 331; Peabody v. Stark,

16 Wall., 240, 243; United States v. Graham, 110 U. S., 219; Hewett v. Shultz, 180 U. S., 139, 157; Powers v. Slagt, 180 U. S., 173, 180.

United States v. Alabama G. So. R. R. Co., 142 U. S., 615, 621, held, of Departmental construction of a statute, that:

> It is a settled doctrine of this court that * * * if such construction be acted upon for a number of years, [the court] will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction, may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizen should be changed in such manner as to become retroactive, and to require repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the government. These principles were announced as early as 1827, in Edwards Lessee, v. Darby, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions: United States v. State Bank, N. Car., 6 Pet. 29, 39; United States v. McDaniel, 7 Pet. 1; Brown v. United States, 113 U. S. 568; United States v. Moore, 95 U. S., 760, 763.

In 7 Peters 1, 8, cited by the court, it was said that "No change of such usages [construction] can have a retroactive effect, but must be limited to the future."

See also Michigan v. Jackson R. R., 37 U. S. App. 229.

IV.

THE NECESSITY OF FILING A NON-OCCUPANCY AFFIDAVIT AS A PART OF A FOREST LIEU LAND SELECTION BEFORE EQUITABLE TITLE TO THE SELECTED LAND CAN VEST IN A SELECTOR.

The question then arises, was the selection, when made in form and substance such as entitled it to be approved; that is, did it conform to the requirements of the Act of June 4, 1897?

The selection did conform to all the requirements of the Act.

The bill adjudged bad on demurrer alleges that the selector had good title to a tract of land in a forest reserve, relinquished it by a good deed of conveyance to the United States duly recorded in the proper county, obtained an abstract of title duly certified by the recorder of titles and taxing officers, showing that the deed conveyed a perfect and unincumbered title and filed these instruments in the Visalia Land Office, with the *usual affidavit* required of non-mineral entry men that the land was non-mineral, and filed his selection for the land which had been returned by the surveyor as non-mineral and which stood on the records of the Visalia Office as subject to non-mineral settlement entry. It is submitted that makes a case of perfect right and vested equitable right in him to patent from the Government for the land so selected.

The bill does not say that the Selector filed an affidavit that the land was then "unoccupied." For lack of this affidavit the Circuit Court of Appeals held the selection invalid, embodying in its opinion (81) the

holding of the Secretary of the Interior that such affidavit is an essential prerequisite, viz., that,

> To be vacant, the land must not be occupied by others. * * * As to *conditions* the existence or non-existence of which cannot be determined by anything appearing upon the public records and as to which the Officers of the Government must depend entirely upon outside evidence, that is, *whether the selected tract is occupied by others* * * * it is manifestly necessary that the required evidence should be furnished by the selector. The Officers of the Government cannot be expected to know whether land selected under the Act is vacant * * * and in these respects subject to selection. * * * Obviously, therefore, it could not have been contemplated that the local officers of the various land districts, should, or could from personal knowledge, determine the physical conditions pertaining to lands selected under said Act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior. Nor can selections be lawfully accepted until there is a showing that the selected land is vacant. * * * No other lands are subject to selection and no selection can be regarded as complete until these *essential conditions are made to appear*. They do not appear from the public surveys. The lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or *unoccupied* * * * are matters not shown by the land office records.

As the opinion of the Circuit Court of Appeals rests so largely upon the soundness of the Departmental opinion in the Kern Oil Co. case, *supra*, it becomes necessary for us to examine with some care the views exprsesed by the Department in that case. This we have already done as to the meaning of the word vacant; and we will now examine the claim that a non-occupancy affidavit is required by Departmental regu-

lation before the equitable title can vest in a selector, although his selection has been accepted and allowed by the local land office without suggesting such requirement.

The approval by the Circuit Court of Appeals of the foregoing language of the department is in effect to hold that the completeness of the selection alleged depends upon the necessity of the non-occupancy affidavit, an affirmative sworn statement by or for the selector that the selected lands were unoccupied; and as the bill does not allege one was filed the demurrers thereto were sustained.

Vacant, as we have above shown, does not mean unoccupied. It follows that a non-occupancy affidavit cannot be required, for the law has not limited the proposal to *unoccupied land* and the Department has no authority, by alleged regulations or otherwise, to narrow the proposal, or so limit the area subject to selection.

A proper discussion of this subject naturally resolves itself into three headings, (1) the *existence* of a regulation requiring such non-occupancy affidavit, (2) the *validity* of such a regulation, (3) the *waiver* of such a regulation by departmental practice.

We confidently assert that no regulation of the department requiring the filing of a non-occupancy affidavit as a condition precedent to the vesting of the equitable title in the selector under the Act in question ever *existed;* that if it had existed, it would have been *void,* as enlarging the requirements of the statute and imposing a burden, and prescribing a condition not authorized by the statute; and further, that even if

such a regulation ever existed, and even if it were a valid regulation, the department by its practice in the administration of the statute in question, has waived its requirements and is by its conduct estopped from exacting compliance with it in these cases.

(1) THE EXISTENCE OF SUCH A REGULATION.

There was no departmental rule, regulation or practice requiring a non-occupancy affidavit.

The fact that a blank form of selection approved by number only, in a departmental circular, but not embodied therein recites that it is accompanied by "an affidavit showing such lands to be non-mineral in character and unoccupied," does not constitute a mandatory regulation or requirement that such affidavit shall accompany all selections, otherwise they shall be void.

It is claimed that this mere *recital* in the *form* of *selection* approved by the department—but not set out in any rule or regulation of the department, to the effect that said selection is accompanied by an affidavit showing the land was "unoccupied" amounts to a solemn and official *departmental regulation* making it mandatory upon the claimant to make oath that the selected lands were not occupied.

We submit that this is a strained and technical construction and wholly unwarranted. Where Congress has not required an affidavit by the terms of the act, nothing less than a clear, specific, direct and mandatory regulation of the department can compel a selector to do a thing not required by the Act itself. Nowhere in the departmental rules and regulations is one word to be found concerning the non-occupancy af-

fidavit, and an intending purchaser might scrutinize with care the Act of June 4, 1897, and all rules and regulations of the department under such Act as contained in printed circulars, instructions and decisions of the department, and never find a non-occupancy affidavit so much as mentioned; and it is only when he is handed a form of selection at the local land office that he sees that a non-occupancy affidavit is even contemplated; and when his selection is accepted and duly certified by the local land office and entered of record, and no non-occupancy affidavit furnished him by such office, or required of him by such office, or even suggested, he is certainly justified in concluding that the recital in the blank form of selection is immaterial and is merely suggestive or directory, and in assuming that it is not a mandatory regulation vital to his selection.

We wish to emphasize that the only claimed authority of the department for requiring this non-occupancy affidavit is found in the following language addressed to "Registers and Receivers of the United States Land Offices"—contained in the departmental circular of May 9, 1899 [28 L. D. 521], and again printed in the circular of Dec. 18, 1899, found on page 27 of pamphlet issued November 6, 1900, by the Interior Department, and entitled "Compilation of Laws and Regulations and Decisions Thereunder Relating to the Creation and Administration of Public Forest Reserves"—namely: "*The forms of application (4-634 and 4-643), copies herewith, should be used in the classes of cases to which they respectively apply.*" Unless this language together with the form itself therein referred to by number only (4-643) constitute a regulation requiring a non-occupancy affidavit, then there is no such regulation, and none other is claimed. The form referred to contains the recital that it is ac-

companied by an "affidavit showing the land selected to be non-mineral in character and unoccupied." It is not claimed that this form was set out in any of the circulars, instructions or decisions of the Land Department, so that parties dealing with the Government might know of its provisions, or be advised of this recital contained in it.

A recital in a form neither prescribes nor promulgates the substance of the recital as a regulation.

Such a method of making regulations follows the practice of Caligula rather than the law of rule and reason, which, stated by Hoffman, is as follows, viz:

> "Law is a rule of action *prescribed* and *promulgated*. It is obligatory only on those who know the fact of its existence, and therefore *must be promulgated*. It imports a definite order, and must, therefore, *be plainly prescribed*, that it may be understood.
>
> Human laws should not only be prescribed in clear and unambiguous language, *but be efficiently promulgated* or conveyed to the knowledge of those on whom they are to operate. We have seen that Hobbes considers both so essential to the just notion of law, that he has made them a part of his definition of that term. By the former it is not meant that laws should be written out, as the word 'prescribe' would seem to import, but merely that they be conveyed in language as *free from ambiguity* as possible, be it verbal, written or printed. *In regard to promulgation of laws, justice demands that they be made known before they become obligatory. The liberty and property of the citizen may indeed be placed in peril by the vague and unintelligible language of the laws; but much more would this be the case were*

laws permitted to operate without due promulgation."

1 Hoffman's Legal Outlines, p. 275.

And the Secretary of the Interior himself, since his decision in the Kern Oil Co. case was filed, realizing the weakness of his position—that *a mere recital in a form referred to only by number and not printed in any circular or published instruction constitutes a regulation,*—on July 7, 1902 [31 L. D., 372], revised and re-issued his Circular of Instructions under the act of 1897, and inserted therein [p. 375] the following paragraphs. [See also Par. 26, p. 375]:

> "All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are presented, no right will vest under the selection. * * *
>
> "The affidavit to support a selection based upon relinquishment of land covered by a patent or by a patent certificate must be made by the selector, or by some credible person possessed of the requisite personal knowledge in the premises, and must be filed with and *as a part of the selection.* This affidavit must show that the selected land is non-mineral in character; that it contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefor; *and that it is not in any manner occupied adversely to the selector.* (Form 4-061a)."

And also printed in the circular, a form of selection [p. 377], *and a form of affidavit as well* [p. 380].

There was therefore, in legal contemplation, no such regulations when these selections—or those involved in the Kern Oil Co. case—were made.

(2) THE VALIDITY OF SUCH A REGULATION.

A regulation which requires the filing of a non-occupancy affidavit by a selector under the Act of June 4, 1897, at the date of selection and not permitting such affidavit to be filed later, although the selector has fully complied with all the requirements of the statute itself, is illegal and in violation of the selector's rights under the statute.

We maintain that there is no power in the Department of the Interior to exact the filing of a non-occupancy affidavit as a condition precedent to the vesting of an *equitable* title in a selector under the Act of June 4, 1897. *Congress* has defined the conditions upon which the *equitable* title to the selected land passes and becomes vested. The Land Department has no jurisdiction over this feature of the transaction. Its function is administrative solely; that is, it has to determine whether or not the equitable title has in fact vested so as to guide it in passing the legal title—that is, in issuing the patent; but the Interior Department has no power whatever to *name conditions* upon which the *equitable* title shall vest. *Congress has done this, and the congressional conditions cannot be enlarged by the Department.* Congress disposes of the equitable title, and in cases where it provides for a patent, leaves the issuance of the legal title to the Land Department, but Congress has not granted to the Land Department any power whatsoever, by regulations or otherwise, *to determine the conditions upon which the equitable title shall pass.* This is the exclusive function of Congress, and the

Land Department cannot narrow the offer made by Congress or postpone the taking effect of the exchange Congress has authorized or enlarge the requirements imposed by Congress.

The right to select lands under the Act of June 4, 1897, depends upon the statute itself, which fixes the terms and prescribes the conditions of the contract of exchange, and does not require the making of an affidavit. If the land when selected is "vacant land open to settlement" the complete equitable title to the selected land, *ipso facto*, vests in the selector *at such date*, provided he has relinquished to the United States an equal area of patented land within a public forest reserve. Congress fixed the terms of the *contract* by which the equitable title passed. It named *all* of the conditions and requirements. The Land Department being charged with the administration of the law may have a right before issuing legal title—the patent—to ascertain by some proper and reasonable method whether the lands selected are of the class offered, and in doing this—if occupancy be material (which we deny) as a condition precedent to the issuance of legal title,—not as a condition precedent to the right to select, or precedent to the vesting of an equitable title,—might require some further evidence that the land selected is of the class offered.

Departmental regulations must be appropriate, and within the limitations of the statute in the enforcement of which they are designed to aid and which they cannot supplant. The rule on this subject is correctly stated in the following language in Anchor v. Howe, 50 Fed. 366:

> "Under this section [2478 R. S.] the validity of all Departmental regulations which are appropriate and within the limitations of the law cannot be doubted. This, however, is not a grant of power to legislate; to add to the law; to ren-

> der its enforcement difficult; to burden the proceedings under it with unnecessary expense and hardship; or to encumber them with onerous or technical conditions. It is designed that the permitted regulations shall simplify and explain, *not embarrass*, the administration of the law, and certainly they must not only be appropriate, but they must be reasonable and within the limitations and intent of the statute. * * * I am unwilling to say that these and all the Departmental regulations, regardless of their encroachment upon or variation from the law and needless expense and hardship which they may entail, *beyond those which would result by following only the provisions of the law itself*, shall be literally and technically construed and enforced. Such a ruling would not be conducive to the needs of justice. When they must be followed and when they may be disregarded may not be easy to define by any general rule, but in all cases they must be appropriate and within the limitations of the statute in the enforcement of which they are designed to aid and which they cannot supplant. It has frequently been held by the Supreme Court and other United States Courts that regulations in conflict with the law are invalid; *those which enlarge its requirements, though not in exact conflict with, or contradiction of it, should be likewise regarded.*"

We maintain that the ruling in the Kern Oil Co. case approved by the Circuit Court of Appeals, making the selector's rights to the lands depend entirely upon his doing a thing not required by the statute and doing it at the time of selection and not permitting it to be done afterwards, does "add to the law" and encumber it with "onerous and technical conditions," not "within the limitations and intent of the statute." That such a construction does "enlarge the requirements" of the statute will be admitted; for all of these reasons the construction announced by the Department

and approved by the Circuit Court of Appeals in the opinion here under review, must be rejected, as it makes the right of the selector depend not on his compliance with the statute, nor upon the *fact* of the selected land being unoccupied when selected, but entirely upon his filing or failing to file at a certain date, a certain affidavit, not required at all by the statute.

In the case of United States v. Graham, 110 U. S. 219, it was held that where the language of an act is so clear and explicit as not to be open to construction, its construction cannot be changed by the practice of the Departments, however long continued, and in Robertson v. Downing, 127 U. S. 607, it was held that a regulation of a Department does not control the construction of a statute.

This Court held departmental regulations not appropriate to the statute under which they were drawn to be void, in Morril v. Jones, 106 U. S. 466, and Whitney v. Taylor, 158 U. S. 85, 96; in the latter case deciding that

> At any rate Congress has not seen fit to require an affidavit to a declaratory statement and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law, and that is all that is necessary to except the land from the scope of the grant.

The statute here provides that the exchange shall be without expense, fees or charges to the selector. To impose the necessity of an affidavit not requisite is to impose expense and costs. Congress determines what is essential to vest rights and all that it has required of the selector is the relinquishment of land of which he is the "owner" that is to vest good title in the government, and selection of that he wants, of land vacant and offered by the government to others. The Department cannot narrow the proposal nor burden him

with additional requirements. To do so is legislation, not administration, and tends to defeat the act by discouraging relinquishments.

(3) THE WAIVER OF SUCH A REGULATION BY DEPARTMENTAL PRACTICE.

If there ever was a regulation requiring a non-occupancy affidavit, and if the same had been a valid regulation, the requirements thereof have been waived by the practice of the department in administering the law of June 4, 1897.

(*a*) *No non-occupancy affidavit was ever furnished by the Land Department to the local land offices for their use.*

While this court is presumed to have judicial knowledge of the practice prevailing in the Land Department in the administration of the various laws, yet as this in some cases may be rather a judicial fiction, we have printed in the appendix to this brief for the convenience of the court a copy of an affidavit of M. A. Ballinger on file in the Kern Oil Co. case in the Department, showing that up to the time of the decision of the Kern Oil Co. case in April, 1901, no form of affidavit containing a non-occupancy clause had ever been prescribed or printed by the Department or furnished to Registers and Receivers for use under the act of June 4, 1897.

(*b*) *The selections in these cases and in the Kern Oil Co. case were accepted, entered and recorded by the local land officers and such officers duly certified that the lands selected were "free from conflict and that*

there was no adverse filing, entry or claim thereto" without suggesting or requiring of the selector any non-occupancy affidavit.

The local land officers—the Register and Receiver—whose duty it was under the Land Office regulations to give "all proper information about *vacant* public lands," [Circular June 11, 1899, p. 1] and to furnish plats and diagrams, "showing what lands are *vacant* and what lands are taken," [Act of March 3, 1883, Section 2, above Circular, p. 181], and who under section 2224, R. S., as amended [30 Stat. 234], "have charge of and attend to the sale of public and Indian lands"—did not require non-occupancy affidavits in these cases, but on the contrary, accepted the selections in question without objection, entered them of record and certified that the lands were free from conflict and that there was no adverse filing, entry or claim thereto; no such non-occupancy affidavit ever having been prepared by the Department and furnished to the local land offices for their use under such act, it was but natural that such officers should not have exacted such an affidavit.

(c) *It having been the practice of the Department of the Interior, until the time of its decision in these cases, to patent selections under said act though not accompanied by non-occupancy affidavits, and not to require such affidavits, therefore such requirement was waived by such practice, even though there had been a regulation to the contrary.*

The records and practice of the Land Department of which this court takes judicial notice show that it was the practice of the Department, up to the time of its decision in the Kern Oil Co. case—a year and nearly a half after these selections and the selections there involved were made—to issue patents upon forest lieu

selections where no non-occupancy affidavits had been filed; and *the records of the Land Office disclose that hundreds of patents had been issued before the decision of the Department in this case upon forest lieu selections where no non-occupancy affidavits were filed, and that the great majority of the patents issued under such act were of this character.* The only selections accompanied by affidavits which contained a non-occupancy clause, were a few in which such affidavits had been prepared and printed by private dealers in forest reserve lands; and as it became known that the government was not furnishing or requiring such affidavits and was issuing patents *without* such affidavits, it soon became the custom of such dealers to strike out the non-occupancy clause from their printed form of affidavit—just as was done in the Kern Oil Co. case. The records of the Land Department show that never before the decision of the Department in the Kern Oil Co. case was the filing of a non-occupancy affidavit held to be material or to constitute in any wise an element in the right of selection given by the act in question.

When the Court takes into consideration the fact that the local land officers charged with the sale and disposition of the public lands, did not require these affidavits from selectors at the time when their selections were made, and when they might have been furnished without difficulty, but accepted the same and entered the same of record and certified to their correctness in all particulars, and takes into consideration the fact that these officers were never furnished by the Land Department with any non-occupancy affidavits for use under this law, and the further fact that the Department itself has treated such affidavits as unnecessary and immaterial by patenting hundreds of selections under such act where no such affidavits

existed, it must be perfectly clear that this practice concludes and estops the Department from claiming now in the Kern Oil Co. case, for the first time upon appeal, that the selector's rights in the premises,—although he has fully complied with the provisions of the statute,—are entirely nullified by his failure to furnish this non-occupancy affidavit as a part of his act of selection. We submit that a more arbitrary or unjust ruling can hardly be conceived.

(*d*) *The selections in question having been accepted and allowed as entries of record by the local Land Officers, the burden upon the selector of showing the land to be unoccupied, if any, was thereby waived and satisfied and thereafter the selections were presumptively valid and the land presumptively unoccupied until the contrary was shown.*

Even if the burden of proof had been on the selector in the first instance to show by affidavit or otherwise that the selected land was unoccupied—which we deny—still the effect of accepting the selection and allowing the entry of record, as was done by the local officers, shifted the burden of proof to the party attacking such record entry, and the entry thus became *prima facie* valid and can only be set aside by proving its invalidity.

This doctrine rests upon the well-established principle that public officers are presumed to act as their duty and the law requires, and that when they have allowed an entry of record that the same was properly allowed. Therefore the presumption as to the validity of the entry rests upon the presumption that the officers charged with the duty of disposing of the public lands, properly performed their duty, and only allowed a record entry to be made where the facts and law justified it. This doctrine is well settled. See the case of Tan-

german v. Aurora Hill Mining Co., 9 L. D., 538, where Secretary Noble says:

> "There was manifest error in the finding of the local land officers because *they seem to have utterly ignored all presumptions in favor of the regularity and legality of the previous entry,* and assumed in the hearing ordered that the entryman, or those claiming under him, were called upon in the first instance to prove everything had been done which was proper to have been done before the entry could be made, and to explain irregularities alleged to have existed prior to that time. These officers do not find that protestants rebutted the force of *the legal presumptions in favor of the regularity of the entry;* nor that they sustained their allegations by sufficient evidence or mere preponderance of evidence, but the finding is that the applicant 'failed to produce sufficient evidence' to show a former compliance with the law. *The error here is so manifest as to require no further comment.*"

This presumption as to the regularity of entries allowed of record is founded upon doctrines of inherent justice, in this, that if the local land officers by allowing an entry of record have waived or not insisted upon some requirements which the law exacted as a condition precedent to the allowance of such an entry, it is proper that the burden of proof should be upon the party attacking the validity of such entry, otherwise the entryman might be seriously damaged by the action of the local land officers, whereas had they insisted upon his complying with the formal legal prerequisites of a valid entry at the time, he might have been in a position to have easily done so, and would have done so, whereas to hold him responsible for the failure of the local officers to exact of him a compliance with the law after the conditions had changed, might operate to defeat his rights altogether.

A *prima facie* presumption, until rebutted, is conclusive.

Kelly v. Jackson, 6 Peters 632;
Lilienthal v. Tobacco Co., 97 U. S. 268.

In Carter v. Spencer, 4 How., Miss., an entry, which passed to patent, was attacked for want of an affidavit of non-occupancy by one who claimed preference right to the land under the Act of April 15th, 1832 [4 Stat. 503]. The court held:

> "Under this act the Secretary prescribed rules and regulations by which the individuals claiming under it should be governed. The claimant was required to make proof by his own affidavit, supported by the affidavit of a disinterested person, that he was an actual housekeeper on the land. Another rule was that the right conferred by the act was not to interfere with public sales or private entries. And in order to prevent confusion, an applicant for private entry was required to swear that the land designed to be entered was not subject to the right of pre-emption. In the violation of this last provision, it is said that the fraud was perpetrated. * * * It is alleged in the bill that Spencer entered without making this affidavit. This is admitted by the answer, which avers also that no such affidavit was required of him by the register, in addition to which the entry without it is evidence that it was dispensed with by the register. * * * It was a mere instruction which required the affidavit. The law did not require it. * * * But if the instruction was violated, it was done by the register, not by Spencer."

This doctrine is fully applicable here and operates as a complete waiver of the alleged regulation requiring the non-mineral affidavit.

(*e*) ***The alleged regulation was too vague and uncertain to be valid.***

The fact that the local officers did not understand that the approval of the form mentioned (if, indeed, it was ever called to their attention), constituted a regulation requiring an affidavit of non-occupancy, and had not required such form to be used or any proof of non-occupancy to be furnished, and had never rejected any selection for lack of such proof, is of itself controlling evidence that the alleged regulation was too vague and uncertain to be valid; and this is emphasized by the fact that the Commissioner of the General Land Office, who prepared the instructions and form for selection relied on by the defendant, had not, in this case, or any other, regarded a non-occupancy affidavit as essential or understood that said form amounted to a mandatory regulation requiring such affidavit as a condition precedent, and therefore never supplied the local offices with such affidavits.

(*f*) *Purposes of both non-occupancy and non-mineral affidavits fully accomplished by other regulations of the Department.*

We call the Court's attention to the following regulations of the Department under this Act appearing upon page 26 of the Circular concerning Forest Reserves, issued November 6, 1900. The same provision was in the former circular, of May 9, 1899, which was in effect when these selections were made:

> "Selections of unsurveyed lands will in no event be passed to patent until after the lands have been surveyed, nor until after the expiration of four months from the date of receipt at the local land office of the approved plat of survey of the township embracing the lands selected; and selections of surveyed lands will not be passed to patent until after the expiration of four months from the date of selection.
>
> *The purpose of the preceding paragraph is, in all instances, to give settlers or other claimants, if*

any there be, at the time of selection, ample opportunity to lawfully assert their claims or file their protests in the local office and to afford time for the local officers to advise the Commissioner of the General Land Office of such adverse claims before the time arrives for issuing patent under the selection.

In selections of surveyed land which has been returned as mineral, or which is within six miles of any mining claim, and in all sections of unsurveyed land, notice of the selection, commencing within twenty days thereafter, must be given, for a period of thirty days, by posting upon the land and in the local land office, and by publication at the cost of the applicant in a newspaper designated by the register as of general circulation in the vicinity of the land and published nearest thereto."

It is perfectly clear that these regulations more than accomplish all the purposes claimed as intended to be accomplished by the non-occupancy and non-mineral affidavits.

The necessity of a non-mineral affidavit in forest lieu selections, where the land selected is returned as agricultural in character and selections have been allowed by the local land office.

In these cases the bills allege that non-mineral affidavits were filed, which the demurrers admit, but in view of the fact that the Circuit Court in these cases has laid great stress upon the importance of and the character of the non-mineral affidavits, filed in the local land office, in connection with these selections, and in view of the fact that the land department in the case of Gray Eagle Oil Company v. Clarke, 30 L. D., 570, has held that a Forest Lieu selection of land returned as agricultural, and accepted by the Register and Re-

ceiver, is invalid, though the land be in fact non-mineral when selected, unless a non-mineral affidavit is filed therewith,—we invite the Court's attention to a brief discussion of the necessity for filing such an affidavit *as a condition precedent to the vesting of an equitable title* in the selector, under the Act of June 4, 1897.

We maintain that a selector's title to Forest Reserve Lieu lands depends upon the *fact* as to whether or not the selected land is *known to be mineral* when selected, and not upon any contemporaneous *ex parte* evidence on that subject; and that a non-mineral affidavit is at most only *prima facie* evidence of such fact, and merely raises the *presumption* that land is non-mineral, and as this same purpose is accomplished and this *same presumption* is raised by the non-mineral or agricultural return of the Surveyor-General, such a non-mineral affidavit, at best, is only cumulative; and not being binding either upon the Government or upon third persons, its absence cannot invalidate a selection of lands otherwise valid.

That land returned by the Surveyor General as agricultural, is presumed to be such, until the contrary is proven, and that the burden of proof is upon him who asserts the contrary. See Caledonian M. Co. v. Rowen, 2 L. D., 714; Hooper v. Ferguson, 2 L. D., 712; Winters v. Bliss, 14 L. D., 59; Jones v. Driver, 15 L. D., 514.

In the case of Johnston v. Morris, 72 Fed. Rep., page 897, Circuit Court of Appeals of California, speaking of the significance of surveys and records of the Land Department, says:

"In Sutton v. State of Minnesota, 7 Land Dec. Dep. Int., 562, 564, the Secretary of the Interior said:

> "The field notes of survey, being entries in writing made by a public officer in the regular discharge of his duty, are presumptively correct,

> and are *prima facie* evidence of the fact stated, of a very high character. They must be taken as true, till disproved by a clear preponderance of the evidence."

In Re John W. Moore, 13 Land. Dec. Dep. Int., 64, 66, he held that:

> "The returns of the surveyor general and the record of the survey made under his direction are evidence of the highest character, that no private survey can be allowed to overcome."

In the same case [Johnston v. Morris], the Court proceeds to say that the question is, what is the status of a school section when the state comes to make a selection? If it is mineral land, it is free and open to exploration and purchase under the laws of the United States, and *if it be so classified by the Land Department, it cannot be taken by the State,* but other lands may be selected as indemnity for the loss. The Court held that the State, having a right to select certain lands, could make that selection *on the survey and classification of the land as made in the Surveyor General's return*, and that such selection so made, based on said return and the records of the Land Office, was a binding and valid selection in favor of the State.

This case holds that the Government deals with its lands in the character in which such lands are classified by survey, and such dealings are *prima facie* legal.

This holding is consistent with rule 102, Mineral Land Regulations, to which the attention of the Court has been called, found in 28 L. D., page 610, which declares that "no public land shall be withheld from entry as agricultural land, on account of its mineral character, except such as is returned by the Surveyor General as mineral."

The purpose of the non-mineral affidavit, so far as it was intended as a protection to third parties claim-

ing mineral rights in the land is fully accomplished by the Department's regulation, already referred to, requiring posting on the land and publication in adjacent newspaper before issuance of patent.

In Re Stimson [15 L. D. 255] the Department held the non-mineral affidavit not essential to vesting of equitable title under a non-mineral entry, as the character of the land might be otherwise ascertained. Under these circumstances we insist that any regulation requiring a non-mineral affidavit with forest lieu selections would only have been directory and not mandatory, or of the essence of the selection.

We maintain, however, that at the time these selections were made, there was no regulation of the Land Department requiring non-mineral affidavits to accompany forest lieu selections.

The claim that a non-mineral affidavit is required under the Act of June 4, 1897, because in the general circular approved July 11, 1899, it is provided in Section 24, page 87, that "in all entries of non-mineral lands in the States of Arkansas, California, [and other named States], a non-mineral affidavit is required."

The foregoing is the only regulation relied on by the Department as requiring a non-mineral affidavit to accompany forest lieu selections.

To any one familiar with the practice and custom of the Land Department of issuing special circulars and instructions under *each new special law*, for governing proceedings thereunder, it is perfectly plain that the general circular "showing the manner of proceeding to obtain title to public lands under the homestead, desert land and other laws," as stated on its title page, has no reference whatsoever to the "manner of proceeding" under laws *in nowise set out or even mentioned* in such circular, and concerning proceedings under which

such circular contains no regulations or suggestions whatsoever.

This conclusion is doubly emphasized by the statement at the end of the general circular, just before the signature of the Commissioner of the General Land Office and of the Secretary of the Interior, as follows:

> "Laws and instructions relating to mining claims, bounty land, railroad adjustments, townsites, timber depredations *and other special matters form the subject of separate circulars.*"

When this is taken in connection with the fact that on June 30, 1897, immediately after the passage of this Act of June 4, 1897, the Department by a special printed circular adopted rules for the administration of such Act, [Sec. 24 L. D. 589], and afterwards from time to time issued, printed and promulgated new special circulars thereunder,—the one governing these cases being issued May 9, 1899, found in 28 L. D. 521-524,—which purported to contain *this law, and all regulations under this act,* and which are in no wise embodied or even mentioned in the general circular relied upon here as requiring the non-mineral affidavit, although such law and regulations thereunder were then extant and contained in special separate circulars, it is too plain to permit of argument that the general circular only applies to acts *therein treated of,* and not to those which form "the subject of separate circulars."

We call the Court's attention, however, in this connection to the recent decision rendered April 23, 1892, by Judge Wellborn of the United States District Court for the Ninth Circuit in the case of the United States v. Maid, 116 Fed. 650, wherein he held that the requiring of a non-mineral affidavit, even in homestead entries—which are embraced within the subject-matter of the general circular requiring such affidavit—*was*

unlawful and inoperative, as it enlarged the statutory requirements imposed upon the entrymen.

When we have not only the presumption as to the non-mineral character of the land, growing out of the non-mineral return of the Surveyor General, but in addition, have the presumption of the regularity of the entry, based upon the action of the local land office in accepting the selection, and when the purpose of the non-mineral affidavit has otherwise been fully accomplished by the formal regulations of the Department requiring the posting on the land, and publication in an adjacent newspaper, of notice of the selection, it would certainly seem to be unfair to hold that a selection of land actually non-mineral in law, when selected, could be defeated by a mere failure to file a non-mineral affidavit at the time of selection; for under the law, the title vests at the date of selection, if the selected land was *then subject to selection*, and does not depend on the contemporaneous filing of a non-mineral affidavit, and should not be defeated by a discovery of mineral after selection and before the filing of such a non-mineral affidavit.

The absurd consequences of requiring a non-occupancy affidavit.

In its transactions the government recognizes none but record claims [Tarpey v. Madsen, 178 U. S., 215, 225, 227]. It needs no affidavit of non-occupancy for the land office record alone speaks whether the land is vacant. In equity the exchange is complete when a qualified selector indicates the land and it is free from any record claim. To hold the contrary leads to absurd conclusions. (1) The form is put above the substance, as a later selector filing affidavit to a fact shown of record may defeat an earlier one who complied with the

Statute by conveying the Government good title to land it asked and selecting land of the class offered. (2) The regulation is put above the statute. A selection made before the rule is good, and one after the regulation, fully conforming to the law, is void and not amendable. (3) Under the Act of 1883, *supra*, a selector obtains a certified plat of "lands *vacant* and lands taken" and then must file an affidavit for the information of the officer who made the certificate as to the same fact to which he has certified.

A selection cannot be void if all is done that the statute requires. In entries and settlements of public lands rights acquired are measured by the act of Congress under which they are claimed. [Rector v. Ashley, 6 Wall. 142, 151; Frisbie v. Whitney, 9 Wall. 187, 194-5]. If the statute is complied with, equitable title vests. At that point of time all that the statute requires is done, and all that remains to be done is evidential and ministerial and not of substance but of form only. If there be anything in form or evidence irregular it is curable by amendment—and supplemental proof. No intervening equity can be higher than that of a purchaser for full value paid. [Boone v. Chiles, 10 Pet. 210; Pomeroy Eq. 2nd Ed., Sec. 819]. The equity first in time must prevail.

If an affidavit of non-occupancy can properly be required its absence was matter of form only, the lack of which cannot be held jurisdictional rendering the selection void. When the Act of June 22nd, 1860 [12 Stat. 85], required a sworn copy of the Government survey to be affixed to and filed with the petition and it was not done, in United States v. Morant, 123 U. S. 335, 343, the court held that it was

> not a question of jurisdiction but a matter relating merely to the form of procedure, which should have been objected to when the pleadings

were *in fieri*, and the petitioners could have obtained leave to amend.

The bill shows that the essential facts required by the statute existed, and that the local officers representing the government received the applications and proofs of right without objection to their form or completeness, or warning of any defect when the selector could have complied with every requirement. Objection cannot therefore be taken that no such affidavit was furnished. Local officers represent the government and under Sec. 2234, Revised Statutes, as amended January 27, 1898 [30 Stats. 234], "have charge of and attend to the sale of public and Indian lands." Parties dealing with the government properly rely upon their acceptance of papers tendered to them as evidence that they are good in form till advised to the contrary.

But grant for argument that vacant means unoccupied. No affidavit to such fact can be required, or is a reasonable regulation as the record is at least prima facie evidence, and the regulation shifts the burden of proof.

Where the statute limits entries to "unoccupied" land, as in the Valentine act [17 Stat. 649], Second Baca act [13 Stat. 125], and Sioux Halfbreed act [10 Stat. 304], the department has always proceeded on the *prima facie* evidence of its records and has never required an affidavit of non-occupancy, leaving the burden of proof upon a subsequent applicant alleging prior occupancy to prove the facts, and its legal character. Under the Swamp land acts [11 Stat. 251, and 19 *ib.* 395], using the words "vacant and not interfered with by an actual settlement under any existing law of the United States," the State's selections are passed, upon

the presumption of the record, without requiring an affidavit to negative the condition, leaving the settler combatting the State's selection to his proof. The court held in Water and Mining Co. v. Bugboy, 96 U. S., 165, 167:

> As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the survey; and if the settler *failed to assert his claim, or to make it good, the rights of the State became absolute.*

No notice is taken of, or protection afforded to, an occupant's right *unless he advances from an intention existing only in his mind, to a formal record declaration of it.* This is the doctrine of Tarpey v. Madsen and cases there cited.

Such regulation violates the rules of evidence and is unreasonable.

The primary rules of evidence determine the presumptions of fact. What is *prima facie* evidence of a fact in issue and upon whom is the burden of proof? The records of the land department by force of the land laws are *prima facie* evidence of the character of the land and of the condition of the title, and the burden of proof is upon him who asserts to the contrary. One asserting a right to public lands may rest upon the *prima facie* proof of the record in absence of a showing that will overcome it. This principle was laid down early in the administration of the public lands in 1836 by the Attorney-General [3 op. 126, 127], and has since, in general, been observed.

From the nature of things public lands shown vacant of record must be presumed to be unoccupied; land once open to settlement and entry is presumed to remain so if not taken. The government has the title

and as legal owner is presumed to have possession, if there is no record of an appropriation of the land. Where the law has made no specific requirement of proof the department cannot impose the burden of proof on the claimant where the established rules of evidence place no burden upon him, for its rules and regulations must be *consistent with law*.

In case of Valentine Scrip placeable only on unoccupied land, local officers were directed to use military bounty land warrant blanks, merely changing the style, title and date of the act. [Instructions June 17, 1874, paragraph 8, Copp's Landowner 69]. This required no non-occupancy affidavit and the burden of proof of a prior settlement was thrown upon the settler asserting it [Coleman v. Collins, 10 Copp Landowner, 199]; and the same rule of evidence was applied in cases arising under the Sioux Halfbreed scrip act, *supra*, by Circular Instructions of February 22, 1864 [1 Copp Landowner, 142], and May 28, 1878 [5 Copp Landowner, 128]. So under the railroad grant acts, if lands were claimed to be excepted from the grant by a settlement prior to definite location of the road, the burden of proof was on the settler. Thus in Freeman v. Railroad Co. [2 L. D. 550] the Department held that:

> The burden of proof rests upon Freeman to show affirmatively that at said date a valid subsisting adverse right had attached to the premises. Such a state of facts cannot be presumed.

And in Slate v. Dorr, 2 L. D., 635, the department held that:

> While the doctrine is sound that an entry is an appropriation of the land covered by it, it cannot be held to be an appropriation of land already appropriated. Where there is a valid prior preemption claim to the tract, the settlement is an appropriation of it and the entry subsequently al-

lowed is subject to such claim. Therefore *the entry appropriates it against the whole world except the prior settler* and against him it is null and void *if he only asserts his claim.* The assertion of such claim necessarily initiates a *contest and the rule* is that the burden of proof is on him who contests the claim first of record.

But if a non-occupancy affidavit were necessary, it was only so for the information of the officers of the government, and was waived by them in receiving the application without it.

Grant for argument that vacant means unoccupied and that a non-occupancy affidavit should have been given for information of the government, yet its absence was the fault of the local officer in taking the application without it, it was waived. No injury was done as the bill alleges that the land was in fact "vacant land open to settlement" and shows that the land was in fact unoccupied, for the bill alleges that the mineral claimants came on the land subsequently, so that the case is stronger than Spencer's, above cited. The relinquishment and a selection having been made, all the essential facts existed, and the complete equity belonged to the selector, which he is entitled to protect, and complete, as to form, as against the government and all subsequent claimants having notice of the application as these did. Under such facts and as to such persons, the application is equivalent to a final entry. (Shipley v. Cowan, 91 U. S., 330, 337; Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428, and many cases there cited). In the initiation of a pre-emption claim, no affidavit of the party is essential; the government may otherwise ascertain the fact (9 Op. Atty. Gen. 499). It is clear therefore that as such affidavit

is only for information of the officer called upon to act, if he acts without it and receives the selection the equitable title vests.

V.

THE CASE OF OLIVE LAND & DEVELOPMENT COMPANY V. OLMSTEAD, 103 FEDERAL 568.

On July 9th, 1900—just seventy-five days before deciding the case at bar—the circuit court for the ninth ciruit (Judge Ross), in an able and exhaustive opinion decided the case of Olive Land & Development Company v. Olmstead, 103 Fed., 568—a case which we submit, is in all material respects, identical with the present cases.

This Court's special attention is called to such opinion, as it sustains in every detail the positions for which we are here contending. The case was regarded by the court as a test one, intended to serve as a precedent in a large number of similar cases; and upon its face, the opinion purports to be the result of a careful judicial examination of the questions involved, as is evidenced by the following language of the learned Judge, viz:

> "The great importance that the oil industry has already assumed in this State, the enormous value of oil producing lands and the consequent avidity with which they are sought, coupled with *the fact that the present suit will serve as a precedent for others now pending, has induced the court to take the case up out of order, and to give to the questions presented careful consideration*, TO THE END THAT THE LAW UPON THE SUBJECT MAY BE SPEEDILY SETTLED AND THE WAY INDICATED BY WHICH THE TITLE TO SUCH LANDS MAY BE ACQUIRED, *and the important industry referred to encouraged and developed.*"

In view of the fact that the Court itself considered such case as a test case, and as intended as a precedent to *settle the law* and to *indicate the way* by which the title to such lands might be lawfully acquired, it is of importance that such case should be carefully analyzed that it may be seen exactly what questions were there involved, and exactly what propositions of law were there determined; and then to ascertain the difference, if any, between that case and the present cases which justified the same court in reaching such diametrically different conclusions in these cases.

The case of Olive Land & Development Company v. Olmstead was presented to the Court on plaintiff's bill, and on defendant's demurrer and answer thereto, and on complainants' motion for judgment on the pleadings; the effect of which was, that the averments of complainants' bill, except as denied by the answer, were admitted, *and all of the averments of the defendants' answer were admitted to be true.* The bill in the Olive case, so far as the statement of complainants' title is concerned, is an exact counter-part of the bills in these cases—except as to the description of the land involved and the names of the parties—and only differs from the present bills in that defendants' entry upon the land for the purpose of drilling for oil, and if found, of removing the same, was only threatened, in the Olive case, whereas, in the present cases, such threat was in process of being accomplished, when suit was brought —that is, the defendants had already gone into possession—*after complainants' selection was made,* however—and before suit was brought had drilled for and found oil, and were threatening to remove the same.

The bills are identical, however, in alleging that the complainants' selections under the Act of June 4, 1897, had not yet been approved by, and were still pending before, the Commissioner of the General Land Office.

and that prior to complainant's selections under such Act, that defendants had marked the boundaries of the land in question, and claimed the same as a placer oil claim, but that no discovery of oil was made thereon prior to the complainants' selection thereof under the Act of June 4, 1897, and the same was shown and returned as non-mineral land on the books and records of the local Land Office.

The answer in the Olive case does not deny the facts alleged by the bill, but avers "that the land in controversy is of no agricultural value, and of but little, if any, value for grazing purposes, and has no appreciable value for any purpose except for the petroleum that may be obtained by boring or drilling therein."

Such answer also avers that the lands are in a well-known petroleum producing belt, and that adjacent properties, with similar surface indications, are producing petroleum in large and profitable quantities, and many indications or symptoms of the petroleum character of the land in question are given, which it is alleged were sufficient to justify defendants in locating the same as petroleum land under the placer mining laws, which locations had been made, the answer alleges, prior to the complainants' selection of the same, under the Act of June 4, 1897.

The answer further avers that "Johnston [complainants' predecessor in interest] did not select the lands in controversy for their agricultural or grazing value, *or for any purpose except to obtain thereby the undiscovered petroleum that might be found therein*, of all of which the complainant had knowledge, and that the selection of Johnston, under the Act of Congress referred to, for the purposes stated, was fraudulent and in violation of the spirit and purpose of the Act of Congress, under which he pretended to proceed."

It will not be overlooked that the complainants' motion for judgment on the pleadings in that case nec-

essarily admitted *all the facts* averred in defendants' answer; but did not admit the conclusions of law averred, that the defendants' placer location was justified or valid, or that plaintiffs' selection was fraudulent, on account of having been made solely for the purpose of obtaining the land for its supposed petroleum value.

The contention of complainant in that case was, that the complete equitable title to the selected land vested in complainants' predecessor in interest at the very instant of selection, regardless of the prior, so-called placer location made by defendants, and regardless of any subsequent mineral discoveries that might be made thereon, and that such title did not remain in abeyance, until the selection was approved by the Commissioner of the General Land Office.

The defendants, on the contrary, claimed that no title vested in the selector under the Act of June 4, 1897, until approval of the selection by the Commissioner of the General Land Office, and that the lands were open to exploration for mineral discoveries in the meantime; and further claimed that the evidence of oil discoveries averred in the answer to have been made before complainants' selection, were ample to justify and validate the placer location under which defendant claimed.

(See Statement of facts in opinion, pp. 569-571).

Upon these conceded facts, the court held the law to be as follows:

1. That the Forest Reserve Lieu Land Act of June 4, 1897, constituted a continuing, standing offer by the Government to exchange any of its "vacant land open to settlement" for a similar area of patented land in a public forest reserve. That such offer of exchange is accepted and becomes binding on the Government as a consummated exchange of properties, whenever the owner of patented land within a public forest reserve

relinquishes the same to the United States by deed, and furnishes to the register and receiver of the local land office such deed and an abstract of title, showing good title to the land relinquished, and designates upon the books of the local land office the particular "vacant land open to settlement" selected by him in lieu thereof; that if the land selected is "vacant land, open to settlement," when selected, the equitable title thereto vests in the selector *eo instanti* at the date of selection.

2. That the right to select any particular piece of land, in lieu of surrendered Forest Reserve land, depends upon the *known* character of the land selected *at the time of selection.*

3. That the land department may at any time before issuing patent, inquire into the *known* character of the selected land *at the time of selection,* but *may not refuse to issue patent because of mineral discovered subsequent to selection; nor on account of the mineral character of adjacent lands.*

4. That mineral land, within the meaning of the statutes, is not land within the hidden depths of which mineral in fact *exists,* but is land containing *discovered* mineral.

5. That a location under the placer mining laws gives no right to land containing oil, *unless there has been an actual discovery of oil within the limits of the location*; and that mere *indications* of oil, however strong, do not make a *discovery.*

6. That a mere placer mining location in the absence of discovery, gives no right of possession against the Government, and hence none against its grantee, the selector under the Forest Reserve Lieu Land Act; and that the possession and improvements of a placer claimant, prior to the discovery of oil, do not prevent

the land being vacant and subject to location under the Forest Reserve Lieu Land Act.

7. That the fact that the selector did not select the land because of, or for its agricultural or grazing value, *but solely with the hope of finding or developing oil thereon, would have no effect on the selection,* for the reason—as stated in the court's own language—"that *the statute conferring the right of selection, does not make that right in any way depend upon the intent with which it was made.*"

It will be seen at a glance that the Olive case fully sustains every position for which we are here contending. In the opinion of the Circuit Court in the present cases, the learned Judge who wrote the opinion in the Olive case, still says—or at least, seems to say—that the Olive case states correctly the law as applicable to the facts of that case. And, although the difference between the conclusions reached in these cases and those announced in the Olive decision, are diametrically at variance, yet this variance, it is said, grows out of the difference between the two cases, and it is because of this difference, we are told, that the application of the law in the present cases, produces a result absolutely opposite to that which followed from the views previously announced.

If, therefore, we find, upon analysis, that these so-called differences, *in legal effect*, amount to nothing, it would seem that in the present cases the law has been wrongly applied, and that instead of censure of complainant, because of alleged fraudulent practices, it should have been held that the complainants were entitled to the equitable protection of the court.

In view of the fact that the grounds upon which the Circuit Court (Judge Ross) rests its decision in these cases, have not been accepted or followed by the Circuit Court of Appeals in deciding the cases upon ap-

peal, and as the latter court has rested its decision upon entirely different grounds, and in view of the fact that the Secretary of the Interior in the Kern Oil Company case, 30 L. D., 550, has expressly rejected the grounds upon which the Circuit Court rested its decision in these cases, and as the Circuit Court of Appeals in these cases has quoted with approval such decision of the Secretary, without questioning its soundness in this regard, we do not feel called upon to enter upon a reply *in detail* to the various grounds given by Judge Ross for his decision in these cases. As such decision is, however, from our point of view, so irreconcilably at variance with his previous decision in the case of Olive L. & D. Co. v. Olmstead, 103 Federal, 568—which we submit, properly decides the law of this controversy—we feel that we must review briefly the Circuit Court's opinion in the present cases in the respects in which the learned Judge endeavors to differentiate these cases from the Olive case.

VI.

REVIEW OF THE CIRCUIT COURT'S ALLEGED DISTINCTIONS BETWEEN THESE CASES AND THE CASE OF OLIVE L. & D. CO. VS. OLMSTEAD 103 FED. 568, WHICH JUSTIFY SUCH DIAMETRICALLY DIFFERENT CONCLUSIONS IN THE TWO CASES.

There are three important particulars in which the Circuit Court, in the present cases, claims that the same are to be differentiated from the Olive case:

1*st*. It is said that in these cases a Land Office rule was brought to the Court's attention, which states that selections filed under the Act of June 4, 1897, are to

be forwarded by the Register and Receiver to the Commissioner of the General Land Office for consideration, and *that this rule shows* that the action of the local land office in accepting such selections *is not conclusive* on the department; but that the consideration and *approval* of selections by the Commissioner is necessary, and *hence* such approval becomes a constituent part of the selection itself, and therefore, until such approval is had, there is no selection, and a mineral discovery made any time before such approval would be fatal to the selection; and it is said that no such rule of the Land Office was called to the Court's attention, in the case of Olive L. & D. Co. v. Olmstead, and *therefore*, in that case the Court held that a selection took effect and vested the equitable title at the very instant of its selection, and would not be defeated by subsequent mineral discoveries.

2nd. It is said that a selector's *purpose* in making his selection under the Act of June 4, 1897, was held to be immaterial in the Olive case, because there such purpose was merely admitted by the pleadings, and did not interfere with any rights of the defendants; but that in these cases, complainants' purpose was fatal to the selection, as such purpose appeared by an affidavit on complainants' behalf, and such purpose interfered with defendants' rights, and because such purpose had been falsely stated by the selector in non-mineral affidavit required of him by the register and receiver of the local land office at the time the selection was made.

3rd. It is said that the conclusion reached in these cases differs from that reached in the case of the Olive L. & D. Co. v. Olmstead, because it was not called to the Court's attention in the Olive case that the repeal of the pre-emption law and the consequent modification of the homestead law had reserved from the operation of the non-mineral land laws all lands *in fact mineral,*

though not *known* to be such at the time when the non-mineral applicant for such land has paid the full purchase price therefor, or otherwise fully complied with the law entitling him thereto; whereas, before the repeal of the pre-emption law and the consequent modification of the homestead law, only lands *known* to be mineral at the time a non-mineral applicant for the title had paid the full purchase price, or otherwise complied with the law—were reserved or excluded from such applicants' non-mineral entry, selection, or purchase.

We will briefly examine these three alleged vital differences between the two cases, and see if they justify the difference in conclusions reached.

The claim that the Court's discovery of a Land Office rule making it the duty of the Register and Receiver to forward all selections under the Act of June 4, 1897, to the Commissioner of the General Land Office for consideration, operates to distinguish between the Olive case and the present cases and to justify the Court in now holding that this rule operates to postpone the date of the vesting of the equitable title in a settler until the approval of his selection by the Commissioner, and constitutes such approval a constituent part of the selection itself.

When it is admitted—as was done by Judge Ross in the case of Olive L. & D. Co. v. Olmstead—*that continuing power to examine and approve selections* under the act in question resides in the Commissioner of the General Land Office until patent issues, independent of the existence of any formal rule of the Department con-

ferring such power, how can the Court's subsequent discovery of a formal rule giving this power—which admittedly already existed—be seriously urged by the Court as a justification for conclusions here that are the very reverse of those reached in the Olive case; for surely, if the *existence* of this continuing power of approval in the Commissioner is unimportant, the mere *means by which that power is conferred* cannot be important. In the Olive case Judge Ross says:

> "Neither the act of the selector, however, in making the selection, nor that of the officers of the Local Land Office upon whose books the selected tract appears to be vacant and open to settlement in accepting and filing the selection *is conclusive* of the then character and condition of the land. *Presumptively* the character and condition of the selected tract is such as is indicated by the books of the Land Office, and therefore the selection, with the approval of the officers of the local land office of a tract appearing upon the books as vacant and open to settlement, in lieu of the similar tract of like dimensions, relinquished to the Government, gives an equity in the selector, which entitles him to protection *until the fact in respect to the character and condition of the selected land is, upon proper notice to the equity claimant otherwise determined by the Land Department. The right to make that inquiry extends to the time of the issuance of the patent contemplated and provided for by the statute.* [Citing cases]. *But this inquiry as has been said, is limited to the character and condition of the land at the time of its selection.*"

And again, later in the same case, the learned Judge says:

> "As has been said, the question *that remains open to inquiry by the Land Department*, up to the issuance of patent, is whether or not the land was vacant and open to settlement at the time of its selection."

And the very conclusion of the opinion shows that the Court was clearly understood that the Land Department still had jurisdiction to determine as to whether or not the land was vacant and open to settlement at the date of the selection, and that the action of the Register and Receiver, in accepting the selections was not the final approval thereof which the Court had in mind as binding the Land Department, as the Court concludes its opinion as follows:

> "It results, from what has been said, that *until it shall be determined by the Land Department* that the tract of land in controversy was not vacant and open to settlement at the time of its selection by the predecessor in interest of the complainant, an equity in that tract exists in the complainant, which a Court of equity should protect against such acts as are here threatened and complained of. Accordingly a decree will be entered in favor of complainant, with the proviso, however, to the effect that should the Land Department or the Government at any time prior to the issuance of a patent for the selected tract, determine that the land was not vacant and open to settlement at the time of its selection, the operation of the decree shall thereupon cease."

From the foregoing, it is certainly too clear for controversy, that in the Olive case *the Court admitted the continuing jurisdiction of the Land Department to approve or disapprove selections under the Act in question*, notwithstanding such selections had been accepted and approved by the local land office; and as it was there held that the *existence* of this continuing power of approval in no wise affected or postponed the date of the vesting of the equitable title, it must certainly follow that a subsequent discovery that *such power was conferred upon the Land Office by a formal rule*, rather than by general statutory authority, could not

affect the question as to when the equitable title vested.

Moreover, in the case of Olive Co. v. Olmstead, Judge Ross, in defining the meaning and the true interpretation of the Act of June 4, 1897, gives the following most unanswerable reason why a Forest lieu land selector's right depends upon the *known* character and condition of the land *at the date of selection*, and why the equitable title vests *then*, and not at the date of the approval of the selection; and we submit, that the irrefutable force of his reasoning in this regard is in no wise affected, either by the *existence* in the Commissioner of the General Land Office of the power of approval of selections, or by the *means by which this power is conferred*.

On page 573 of the Olive case Judge Ross says:

> "In all cases the land authorized to be selected in lieu of that relinquished, is required to be vacant and open to settlement. When? *Manifestly at the date of selection. It is upon its then character and condition that the selector has the right and is bound to act. Before making his selection, he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future.* The right to select is by the statute given to the party invited by the Government to make the exchange, without other conditions than that the land shall be vacant and open to settlement."

As this lately discovered rule of the Land Office has no possible bearing upon the *reasons* given by the Court in the Olive case for selections taking effect as of their date, and as such rule in no wise changes or enlarges the Commissioner's power of approval of selections—which, in the Olive case, was admitted to exist until patent issued, even without such rule—we respectfully submit that the discovery of such rule is an entirely

immaterial matter, and can not be seriously urged as a justification for the Court's change of views on this vital question.

THE ALLEGED FRAUDULENT ELEMENT IN THESE CASES.

The claim that the difference in the Court's conclusions in the Olive case and the present cases is justified by the fact that the purpose of the selector in the Olive Case was merely admitted by the pleadings, and did not interfere with any rights of the defendants, whereas in these cases complainants' purpose appears by an affidavit made on its behalf, and such purpose interferes with the defendants' rights and because such purpose was falsely stated by the selector in the non-mineral affidavit required of him by the Register and Receiver at the time of his selection.

In the present cases, it appears by an affidavit filed on behalf of the complainant, on the application for a temporary injunction, that complainants' predecesor in interest selected the lands in question, on account of his hope or belief that petroleum might subsequently be developed or found thereon by the drilling of wells; commenting upon this fact, Judge Ross, in these cases, says that if the affidavit accompanying the selections and filed in the Land Office had stated:

> "That the applicant, at least believed the lands sought contained oil, and that he wanted them for

> that purpose only and desired to select them under the laws authorizing agricultural lands to be taken in exchange for land situated within a forest reserve that had been surrendered to the Government—no one can doubt that the officers of the local land office would have refused to file or receive the selection of such land under the Forest Reserve Lieu Land Act."

The Court then says that if any such showing had been made in the case of Olive Land & Development Company vs. Olmstead, "the only decree that the complainant would have got would have been one dismissing its bill at its own cost."

In passing, we call the Court's attention to the fact that even if this distinction between the two cases is of any consequence, such distinction is not available to the appellees in this case, as it did not appear upon the face of the complaint, and therefore was not raised by the demurrer thereto, which pleadings alone are properly before this court on this appeal—as we elsewhere show; but waiving this question, we ask, Is there any real distinction between the two cases in the respect mentioned? In the Olive case, as already stated, the answer alleged that the lands in question had no agricultural value and but little grazing value, and was of no appreciable value for any purpose, except for the petroleum that might be obtained therein, and were not selected because of "their agricultural or grazing value, or for any other purpose, except to obtain thereby the undiscovered petroleum that might be found therein."

There can be no question that the effect of the complainants' motion for judgment on the pleadings in the Olive case was to admit and confess that the selection of the lands there in controversy were made solely on account of the prospective oil-producing possibilities of the land selected, and a selection made *solely for this purpose,* the defendants in that case claimed was *fraud-*

ulent and in violation of the spirit and purpose of the statute. The whole question of the *purpose of the selector, and the claim of fraud predicated thereon,* the Court disposed of in one unanswerable sentence, viz:

> *"The statute conferring the right of selection does not make that right depend upon the intent with which it is made."*

We submit that if a court of equity, presumed to be able to pass upon the law applicable to such a situation, would hold, as Judge Ross did in the Olive case, that the right of selection existed if no oil had been discovered upon the land at the time of selection, *regardless of the purposes of the selector*—one of the few positious—if we read the latter decision aright—to which in the abstract he still adheres—certainly, the local officers of the Land Department would be bound to do likewise, and it would be their duty to accept such selection, if it appeared that no oil discoveries had been made thereon, although it also appeared that the selection was made *solely for the purpose* and with the hope of subsequently obtaining oil thereon: and for the learned Circuit Judge to say that if it had appeared by *"affidavit"* in the Olive case that the purpose of the selector had been solely to acquire title to lands for the oil which it was believed to contain, "that the only decree that the complainant would have got would have been one dismissing its bill at its own cost," is in such open disregard of the fact *that such was exactly in effect what did appear in the Olive case,* that his failure to observe this is unaccountable. The pleadings admitted that such was the *sole* purpose of the selector, and it is immaterial for the purposes of this argument whether this appeared by virtue of an *affidavit,* or was conceded to be the fact by the *pleadings.* The Court's position in this regard, however, making important the *means*

by which it appeared rather than the *fact* of its appearance, is in keeping with the other reasoning of the Court already commented upon, in which he concludes that the continuing right of examination and power of approval of selections in the Commissioner, after a selection is made, and until patent issues, is *not important* unless such power is conferred by certain means—*i. e.*, formal rules—when it becomes *vital*.

In view of the exact identity of the Olive case and the present cases, insofar as the admitted purpose of the selector is concerned, the cases cannot be distinguished merely because in one this purpose appeared from the *pleadings* and in the other by an *affidavit*, for surely, if the *purpose* is not important, the *means by which such purpose appears* cannot be. If the purpose of the selector is immaterial, and has nothing to do with his right of selection—as it clearly has not—it necessarily follows that no statement made by the selector regarding such purpose—whether the same be true or false—can in anywise affect the selector's right, whether such statement be made to an officer of the local land office, or to a court of equity, and such a statement, whether true or false, would in no wise vitiate the selection or justify a court of equity in withholding from the selector its equitable protection. As the making of such sworn statement to the local land office—whether true or false—could, and did, in no wise contribute to or affect the complainant's right of selection, and could not legally, and did not, influence or affect the action of such officers thereon, nor in anywise mislead or impose upon the mineral claimants, it is unnecessary to take up the time of this court in discussing the alleged false statements of the selectors' purpose, contained in the non-mineral affidavit, which accompanied the selections in these cases. It may be well in passing, however, to say that the statements contained in such non-

mineral affidavit "that no portion of the land is claimed for mineral purposes and that it is essentially nonmineral land," if material at all—which we deny—are so, because they merely mean that the land is not *lawfully* "claimed for mineral purposes," for certainly, no mere *pretended or unlawful claim*, not based upon *discovery* of mineral, would exclude land from non-mineral entry; and the expression the land is "essentially non-mineral" means no more than merely that it is "non-mineral," without the adverb "essentially," as the law makes no distinction between "non-mineral" land and "essentially non-mineral" land; they both mean land on which no mineral has been *discovered or found*, or land not returned and shown upon the land office records as mineral in character; they have no reference whatsoever to land not returned as mineral and containing *undiscovered* mineral, no matter how valuable subsequent discoveries may show such land in fact to be for its mineral. This is the only construction that can be placed on the non-mineral affidavit that does not make its statement wholly unnecessary and immaterial, and under this construction, it is clear that the statements referred to and stigmatized as fraudulent were *absolutely true*, as the land was not *lawfully* claimed for mineral purposes, and was essentially non-mineral, as it was returned as non-mineral, *and no mineral had ever been discovered thereon.*

The Court's attempt to reconcile the position taken in the Olive Company case that the purpose of the selector there was immaterial because not interfering with the rights of the defendants, while here it is vital, owing to its interference with defendants' rights.

In the course of the opinion in these cases, in attempting to reconcile the former position taken in the Olive Company case—to the effect that the purpose of the selector in making selections under the Forest Lieu Land Act was unimportant and not an element in his right of selection—with the position taken in these cases that such purpose was vital, the court says:

> "That as that case [the Olive case] was made to appear to the court, both as to the facts and as to the provisions of law upon which it rested, the *complainant sought to enforce its own right without interfering with any right on the part of the defendants to the suit;* and it was under such circumstances that the court said, and *properly* said, that the *motive* of the selector was unimportant."

This is virtually to say that the rights of the plaintiff asserted in the Olive case were *not* in conflict with the rights of the defendants, whereas, in the present case the rights of the plaintiff are in conflict with the rights of the defendants. It is perfectly apparent from an examination of the two cases, however, that the rights asserted by the plaintiff in the Olive case were exactly the same character of rights as asserted by complainants in these cases, and that the only distinction between the two cases was, that in the Olive case the defendants claimed the right to go upon the land, and were threatening to do so and extract its oil, whereas, in these cases, they had actually gone upon the land, after complainants' selections were made, and had found oil and

were threatening to remove the oil developed. The defendants in the first case claimed the right to do something that they had not already done, while in these cases they claimed the right to continue to do something they were already doing. How the right asserted by the plaintiff in the first case was *not* in violation of any rights of the defendants, and how the assertion of the same kind of right in these cases *was* in violation of the rights asserted by the defendants, we are not told.

We submit that as in the Olive case the purpose of the selector—as admitted by the pleadings—was to obtain the lands there in controversy solely for their supposed value for oil, and as the court in that case held that such purpose was wholly immaterial, even as against parties who were asserting title thereto under the placer mining laws, it would seem to follow that such purpose would be likewise immaterial in these cases, although here shown by affidavit, instead of admitted by the pleadings; and the cases cannot be distinguished by saying that in one case the purpose of the selector interferred with the defendants' rights, while in the other it did not, as the cases are identical in that particular, for, at the date the selections were made, the defendants in both cases alike, were *claiming* the lands under the placer mining laws, but their claims in each case were alike invalid and unfounded; nor does it aid the court's attempt to distinguish the cases, by saying that there was no false statement of the selector's purpose in the Olive case, as there was in these cases, for the purpose of the selector is not made *material* by any false statement concerning it.

Properly construed, however, there was no false statement of the selector's purpose, for by the statement that the land is sought "for agricultural purposes," is not necessarily meant for farming or crop-

growing, but for any purpose permitted by the law under which the selection was made, which law in this case placed no limit whatever upon the selector's purpose.

The effect of the repeal of the pre-emption law.

The claim that the repeal of the pre-emption law and the consequent modification of the homestead law has operated to reserve from selection, under the Act of June 4, 1897, all lands in which mineral in fact exists at the date of selection, though not known to exist at that time, provided it is discovered before approval of the selection by the land department.

In accounting for the difference in the conclusions reached in the present cases from those reached in the Olive case, the learned Circuit Judge states that the repeal of the present law and the modification of the homestead law by the Act of March 3rd, 1891, was not brought to his attention upon the presentation of the Olive case, and that he finds that such Act of March 3, 1891, operated to exclude from homestead entry, not only all lands containing "known salines or mines," but "all mineral lands," and it is stated that the words "mineral lands" are much broader than the words "lands containing known salines or mines," and that there is a wide difference between them, and it is stated—inferentially at least—that the effect of the repeal of the pre-emption law, and the modification of the homestead law, was to reserve from homestead all mineral lands, whether they were known to be mineral or not,

at the time homestead entry became final, if in fact their mineral character became known at any time before patent issued. We maintain that the repeal of the pre-emption law and the consequent change in the phraseology of the homestead law, which it necessitated, has in no wise affected the law governing this controversy, for the following reasons:

The change in the homestead law by the Act of March 3rd, 1891, operates to enlarge and not to contract its scope.

The change in the homestead law—made necessary by the repeal of the pre-emption law—operated to enlarge the meaning of such law and to extend its application to *all* "unappropriated public lands," instead of limiting it, as had formerly been the case, to such "unappropriated public lands" as were "subject to pre-emption." By striking out the clause "subject to pre-emption"—which narrowed and limited the general language "unappropriated public lands"—the homestead law was not narrowed or contracted in meaning or application, as is claimed, but, on the contrary, was necessarily enlarged, so as to include the lands which were formerly covered and accepted by the limiting clause, which was eliminated by the amendment to the homestead law; unless, indeed, such formerly accepted land should come within the category of "unappropriated public lands," in which event, they would still be excepted from the operation of the law, as was doubtless the intention of Congress. The pre-emption law excepted from entry four certain enumerated classes of land, including land containing "known salines and mines." It must be obvious that if the homestead law formerly applied to *all* "unappropriated public lands," *except certain classes,* and *now* applies to *all* "unappro-

priated public lands," *without any exception,* that the act has not been narrowed, but has been enlarged in meaning. It was so decided by the Land Department in Barber v. Wilson, 28 L. D., 61, and Wheeler v. Rodgers, 28 L. D., 50.

The purpose and intention of Congress in changing the homestead law was merely that it might conform to the altered conditions resulting from the repeal of the pre-emption law, and not to change the meaning of the Act.

It is evident that Congress, in making the change in the homestead law, merely intended to make its language conform to the fact that thereafter there was no pre-emption law, and consequently *no land "subject to pre-emption;"* and it was obvious that to thereafter confine the operation of the homestead laws to lands "subject to pre-emption," when there were no such lands, would have been a patent absurdity, that would have defeated the law altogether, and to prevent this absurdity—but not to change the meaning of the homestead law—the clause "subject to pre-emption" was eliminated from such law, and Congress had no intention of narrowing the homestead law, or of excluding from its operation lands formerly subject thereto. On the contrary, the object of Congress in repealing the pre-emption law was to do away with such law as a rival to the homestead law as a method of acquiring title to the public domain, and to thereby leave for homestead *all lands* that otherwise might have been acquired by pre-emption.

No countenance for such a doctrine as announced by the Circuit Court can be found in the Land Office

decisions construing the homestead law since it was amended in 1891.

We call the Court's attention to the cases of Arthur v. Earle, 21 L. D. 92-93, and Reid v. Lavallee, 26 L. D., 100, and to the more recent case of Dufrane v. Mace, 30 L. D., 216, decided by the Land Department a little over a month prior to the decision of Judge Ross in these cases. In the latter case, the homestead entry, which was initiated July 3, 1891,—after the passage of the Act of March 3, 1891, repealing the pre-emption and modifying the homestead law—was contested by a mineral claimant on the ground that the land was mineral in character; there it was distinctly and necessarily determined that the homesteader's right could not be affected by discoveries of mineral subsequent to final homestead proof and payment.

In so deciding, Acting-Secretary Ryan says:

> "It will be observed the protestants have nowhere directly alleged at any time, notwithstanding that they have had ample opportunity to do so, and that the importance of such allegations and due showing thereunder have been pointed out in both of said decisions, viz: that the said land, or any part thereof, was *known to be valuable for its deposits of copper or other mineral, at the time final homestead certificate therefor issued on the entry of Percy B. Mace—that* is, November 8, 1897, nor has any evidence been filed by them showing or tending to show that any valuable vein of copper or other mineral, or other valuable mineral deposits *was then known to exist therein. Without such allegations or showing, the Department, or your office, would not be justified in ordering a hearing as to the character of the land. Discoveries of mineral, however valuable, after the due issuance of final homestead certificate would not affect in any way the right and title of a homestead claimant.*"

It is thus evident that the Land Department has never discovered that the Act of March 3, 1891, has in anywise affected the scope or meaning of the homestead law insofar as it applies to mineral land, and it is not improper to remark in passing, that in the argument of the case of Kern Oil Company v. Clarke, 30 L. D., 550, in which the same counsel here appearing participated, it was sought by the mineral claimants to have the Department hold as Judge Ross did, that the Act of March 3, 1891, had so changed the homestead law as to exclude from homestead entry all lands in fact mineral, though not known to be such at the time the homestead entryman had fully complied with the law, provided the mineral character of such land became known before patent issued; but, as will be seen from an examination of the department's decision in that case, this view was wholly rejected, and it is also to be observed that no weight whatsoever was given to this view by the Circuit Court of Appeals in these cases, but, on the contrary, the latter court in these cases distinctly rejected this newly discovered theory of the Circuit Court, that the repeal of the pre-emption law and the modification of the homestead law by the act of March 3, 1891, has in anywise affected the meaning of the latter law as applicable to mineral lands. The court says:

> "In the homestead and pre-emption cases, questions have frequently arisen as to the known character of the land at the *date of the cash entry*, and it has been generally held that if the land was then *known* to be mineral land, chiefly valuable for its mineral contents, or more valuable for its mineral than for agricultural purposes, it is not subject to entry. *If no such facts as to the mineral character of the land are shown to exist, the pre-emptioner or homesteader*, if he is possessed with the necessary qualifications, and has fully complied with the pre-emption or homestead laws, as

the case may be, at the time of his cash entry, *is entitled to the land*. The general rule is well settled that a right to a patent, once vested, is treated by the Government, in dealing with the public lands, as equivalent to a patent issued, and when the patent does issue, it relates back to the inception of the right of the patentee." [Citing numerous cases].

(D) The provision of the homestead law excluding "mineral lands" from homestead entry has always been in the law, and is not the result of the Amendment of 1891.

The claim that since the Act of March 3, 1891, *all mineral lands* are excepted from homestead entry, whereas prior to such act, only lands containing "known salines or mines" were excepted, might be tenable, if the language making the reservation of "mineral lands" was imported into the homestead law, by virtue of the Act of March 3, 1891, but such is not the case; the language in question is contained in Sec 2302 of the Revised Statutes, which has remained the same ever since the adoption of the homestead law. It reads:

"Nor shall any mineral lands be liable to entry and settlement under its provisions."

Hence, when it is argued that the homestead law *now* provides that no "mineral lands" shall be subject to homestead, and that this provision is not merely as to "known" mineral lands, the reply is, that such has *always* been the language of the homestead law, and that this language excepting mineral lands from homestead entry was not incorporated into the homestead law as the result of the Act of March 3, 1891, repealing the pre-emption law, and striking the words "subject to pre-emption" from the homestead law. Yet,

notwithstanding that such language reserving mineral lands from homestead entry has *always* been in the homestead law, the Courts and the Land Department have uniformly held that the "mineral lands" which were not subject to homestead entry were lands which were "known to be mineral" at the time the homesteader made final proof and payment, and not lands that were thereafter—and before patent issued—shown to be mineral.

The decision in the Barden case does not support the contention of the mineral claimants, as on its very face it reconciles the interpretation placed upon the settlement laws for which we contend with the conclusion there reached, which is confined in its application to grants to railroad companies.

The case of Barden v. Northern Pacific R. R. Co., 154 U. S., 288, is relied upon by the mineral claimants as fixing the law that should govern this controversy, and as supporting the contention of the mineral claimants that it is the mineral character of the land as shown at any time up to issue of patent that controls.

We call the Court's special attention to the fact that such decision is reconciled upon its very face with the decisions previously rendered by the same court in the cases of Deffeback v. Hawke, 115 U. S., 392, and David v. Wiebold, 139 U. S., 507, which fully sustain our position here, that it is the known mineral character of the land at the date of sale that controls; these were both cases arising under the townsite laws of the United States.

Justice Field, in delivering the majority opinion in the Barden case, commenting upon the case of Deffeback v. Hawke, says:

> "And it was held by this Court that no title from the United States to land *known* at the time of sale to be valuable for minerals of gold, silver, cinnabar or copper, could be obtained under the pre-emption or homestead laws, or the townsite laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands. These three cases, those under the pre-emption and homestead laws and townsite Act, were classed together. It was found that under the pre-emption and homestead act lands containing *known* saline deposits and mines could not be purchased. In the townsite act it was provided that by virtue of its provisions, no title could be acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws. And under the Mineral Act of Congress it was provided that in all cases lands valuable for minerals should be reserved from sale except as otherwise expressly provided. The Court held that under those Acts land could be purchased which was not *known* to be mineral, and from this the inference was drawn that only lands *known at the time of the sale* to be valuable for minerals could be excluded, and if they were not thus *known to be valuable for minerals* a sale might be had.
>
> "This was not a case arising upon a grant like the one under consideration at present, but inasmuch as the law of Congress authorized lands valuable for minerals to be sold generally under the mineral act, and excluded from sale mineral lands when claimed for homesteads or pre-emption or for townsites, it was thought that these conflicting provisions of law would be reconciled by simply excluding from the sale lands *known at the time* to be mineral."

One of the controlling reasons given by Judge Field in that decision for placing the construction that he did place upon the grant to the Northern Pacific R. R., was that such had been the uniform construction placed upon the Act by the Land Department, and for that reason it was expedient for the Courts to follow such construction. The following is his language:

> "Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made *at any time before patent* or certification where patent is not required. *This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error, as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has in effect become a rule of property.*"

Invoking this same rule here, we find that the contrary practice has prevailed in the Land Department from the earliest times *in construing the settlement laws;* in all of such cases, it has been uniformly held that the mineral character of the land, while open to inquiry until patent issued, *could not be affected by any discoveries of mineral made after final proof and payment*, or, in other words, that after the patent was earned, and the full equitable title had vested in the claimant, no subsequent discoveries of mineral could impair such title. The long list of Departmental decisions heretofore cited by us are conclusive as to this being the established practice of the Land Department—such doctrine has thus become a rule of property and applying the same rule here that was invoked by Justice Field in support of his conclusions in the Barden case,

makes it incumbent upon the Courts, and the Land Department to stand by, and sustain, the position for which we are here contending—that no discoveries of oil, after the title has vested, can impair the title thus acquired.

Another reason for the distinction between the interpretation placed upon the words "mineral lands" as applicable to railroad grants on the one hand, and as applicable to the settlement laws on the other, is that grants in favor of railroad companies are always strictly construed in favor of settlers, the people. And a special reason for distinguishing between the grant to the Northern Pacific R. R. Co. and the Forest Reserve Lieu Land Act, is that the former was in the nature of a gratuity, and gifts are always strictly construed in favor of the donor, whereas exchanges under the Forest Lieu Land Act, stand upon the same plane as sales or purchases, which are not governed by any rule of strict construction in favor of either party, and, as already stated, this act must be liberally construed so as to accomplish its purpose—which was to induce the owners of lands within forest reserves to surrender their holdings to the Government.

Another, and a very important reason, for excluding the mineral lands, whether known or unknown, from the grant of the Northern Pacific Railroad was that the territory granted was an enormous domain, believed to be rich in minerals, but which had never been explored for its mineral wealth, and for that reason a strict construction of the grant in favor of the Government was justified, as to reserve only the *known* mineral lands at the date of such grant, meant practically to reserve no mineral lands at all, for the *lands themselves* were then practically unknown, to say nothing of the minerals which they contained.

Regardless of the effect of the repeal of the pre-emption law and the change in the homestead law, the lands here in question were "open to settlement" under the existing townsite laws when selected under the forest reserve lieu land act, and hence were subject to selection under such act.

Even if it were admitted that the repeal of the pre-emption law, and the consequent change in the language of the homestead law, had operated to exclude from homestead entry all mineral lands, known and unknown, it will not be claimed for a moment that this operated to change the scope or meaning of the townsite law, which is one of the settlement laws of the United States, and is always classified as such, and classed with the pre-emption and homestead laws by the decisions. See the following cases which so classify it.

Deffeback v. Hawke, 115 U. S. 392;
Col. Coal & Iron Co. v. U. S., 123 U. S 307;
Davis v. Wiebold, 139 U. S. 524;
Barden v. Nor. Pac. R. R., 154 U. S. 288;
Shaw v. Kellogg, 170 U. S. 312

Although the words "known mines," or "known minerals," nowhere appear in the townsite act, yet this Court, both in Deffeback v. Hawke and Davis v. Wiebold, held such words to be implied and construed them to be in contemplation of law, part of the act.

These decisions, as heretofore stated, are upheld and distinguished in Barden v. Nor. Pac. R. R. Co., and the doctrine upon which they rest is in no wise overturned. Hence, regardless of the claimed effect of the repeal of the pre-emption law operating to narrow the meaning of the *homestead* law, it cannot be claimed

that it in any way narrowed the meaning or proper interpretation of the *townsite* law; and the townsite law being a settlement law of the United States at the date of passing the Forest Lieu Land Act, it follows that any lands that were "open to settlement" under the townsite law, became subject to selection under the Forest Reserve Lieu Land Act; and as *all public lands* returned as agricultural and containing no *known* mines or *known* minerals, are subject to settlement under the townsite law, the same are subject to selection under the Forest Reserve Lieu Land Act.

It is not disputed that Deffeback v. Hawke and Davis v. Wiebol still afford a sound interpretation of the townsite laws, regardless of any subsequent change in the language of the homestead law, but our conclusion is escaped by saying that *these particular lands* were not open to settlement under the townsite laws when selected as forest lieu lands.

There are three different methods provided for by the laws of the United States whereby title to public lands may be acquired under what is known as the townsite laws; under the first of these methods, the President is authorized to reserve public lands for townsite purposes, and when so reserved they are open to sale, entry and settlement under the provisions of sections 2380 and 2381 Rev. Stats.; under this method no entry can be made, unless there has been a townsite reservation; in the second method provided for the acquisition of lands under townsite laws, actual entry may or may not precede the settlement or establishment of the townsite; the language of the Rev. Stat. U. S., sec. 2382, being: "In any case in which parties *have already founded*, or *may hereafter desire to found* a city or town on the public lands, it may be lawful," etc., and in the third method, lands which have already been settled upon may be acquired as a

townsite Rev. Stat. 2387 *et seq.* [See circular as to manner of acquiring title to townsite on public lands, 5 L. D., 265].

Under the first method settlement prior to establishment of the townsite cannot be made, under the second, it *may*, and under the last, it *must* be made, and precede the establishment of the townsite.

The Circuit Judge, in his opinion in these cases, disposes of our argument on this subject in the following sentence:

> "The lands here in controversy were never at any time open to settlement under these laws (the townsite laws), for the reason *that it is not pretended that the lands in controversy are or ever were, within any townsite, and THEREFORE, were never subject to settlement under such laws.* The townsite laws, therefore, have no application to the present cases."

With all due respect to the distinguished judge, who gave utterance to this remarkable statement, that land is not open to settlement under the townsite laws, because not already within a townsite, or, in other words, that it is not *open to settlement*, as a townsite, be*cause it has not already been settled* as such, we submit that he was evidently confusing the words "open to settlement" with the words "open to entry;" otherwise his position is not only untenable, but it is in the very teeth of the law, and is contrary to experience and practice, and the history of the founding of towns on the public domain, and would render the settlement, establishment or entry of townsites impossible and unlawful; as the settlement and the right of settlement must both of necessity, as well as by positive requirement of law, *precede* the existence of a townsite, or the lawful entry thereof, under Sec. 2387 Rev. Stats., as there must of necessity be a *settlement* of a townsite, before there can be what the law recognizes as a town-

site under that section; and the townsite must exist before there can be an *entry* thereof at the Land Office. Before there can be lawful settlement of a townsite, there must be a right to settle, or, in other words, the land must be "*open to settlement.*" The argument of the Court, when analyzed, reverses the very laws of nature, and of growth, and holds that the *effect*—the townsite—must precede the *cause*—the settlement; and as this has not been done here, that is, as there is no townsite established, there can be no right of settlement under the townsite laws; overlooking the necessary fact, as well as the essential requirement of the law, that settlement— and consequently the right to settle—is the very basis of, and a condition precedent to the creation or existence of a townsite under Sec. 2387 Rev. Stats. *The settlement is the beginning; the townsite the end.* And to say that the *end must precede the beginning*, or the right to begin, would be no more illogical than to say that land is not open to settlement as a townsite, because not already settled as such. It would be equally forceful to say that land is not open to settlement under the homestead laws, because not already settled as a homestead.

The Circuit Court's views as to the meaning of the word "vacant" in the Act of June, 4, 1897.

The Circuit Court of Appeals, in these cases, as we have heretofore shown, rests its opinion entirely upon the ground that "vacant" in the Act means "unoccupied." The attitude of the Circuit Court (Judge Ross) on this question is uncertain, he merely throws a *doubt* upon the meaning of the word "vacant," as formerly defined by him in the Olive case.

We print in parallel columns below the conflicting views of that Court on this subject, as expressed in the Olive case and these cases:

From Opinion of Judge Ross in Olive L. & D. Co. v. Olmstead, 103 Fed., 568-573, as to meaning of "Vacant" in Act of June 4, 1897:

"The law is well settled that mere occupancy of the public lands and improvements thereon give no vested rights therein as against the United States, and consequently not against any purchaser from them. Neither the defendants nor their predecessors in interest had made such a location as prevented the lands from being *in law vacant.* Other had the right to enter upon the lands for the purpose of taking them up under the mining laws, if it could be done peaceably or without force, or to acquire a Government title thereto *by any other legal means.*"

From opinion of Judge Ross in the cases at bar, 104 Fed., 20-45-46, as to meaning of the word "Vacant" in the Act of June 4, 1897:

"It is, to say the least, doubtful if persons authorized to select vacant lands only, are authorized to select lands in the actual *bona fide* occupancy of others, under the settlement laws or under a mining location, even though in case of the latter the location be inval'd by reason of the absence of a valid discovery of mineral."

The denunciatory element in the Circuit Court's opinion.

We think it proper, in concluding our review of the decision of the Circuit Court, from which our appeal was taken to the Court of Appeals, to refer briefly to the denunciation in the opinion of the Circuit Court of claimants and one of their counsel.

In holding that claimants' application for an injunction *pendente lite* should be denied, and that the demurrer to the bill should be sustained and the bill dismissed, the learned Circuit Judge, in addition to passing upon the points submitted, in effect finds that the claimants and the counsel to whom he specifically refers were engaged in a huge conspiracy to defraud, and, in effect, finds that the makers of the affidavits

used upon behalf of complainants on the hearing of the application for the injunction had sworn falsely as to the facts in issue upon that hearing. These are very serious charges, and counsel would be derelict in their duty if they passed them without criticism.

It will be borne in mind that at the time of the hearing upon the application for the injunction we were upon the very threshold of this litigation; that the hearing was not upon the merits, and that none of the persons upon either side, whose affidavits were used, were before the Court. That, under these circumstances, the Circuit Judge should, in passing upon an application for a *pendente lite* injunction, in effect also pass upon the case upon the merits, in effect pre-judge the credibility of the witnesses, and upon the statements of unseen witnesses, whose veracity had not been tested upon cross-examination, denounce complainants and certain of their counsel, as was done in the opinion under review, is, to us, simply incomprehensible.

It was, of course, incumbent upon the Circuit Judge, in passing upon the motion then before the Court, to accept, or reject, the affidavits upon the one side or the other; or, if the showing made by complainants was in his judgment insufficient to warrant the issuance of the preliminary injunction, to so hold. But upon what theory a United States Court sitting in equity finds it within its province, jurisdictional or moral, upon a motion such as was then before the Court to suggest, in effect, that the Grand Jury indict the persons whose statements upon affidavit he declines to accept, we cannot even surmise. That the suggestion by the Court concerning an investigation by the Grand Jury was wholly without the jurisdiction of the Court, we have no doubt, and the impropriety of such a suggestion, at such a time, cannot, it seems to us, be open to question, especially when the record shows that

the U. S. District Attorney, to whom the Grand Jury's investigation was committed, was the private retained counsel of the defendants of record in these very cases.

And so, too, we take the liberty of saying that the virtual finding of the Court that the complainants, and counsel named by the Court, and under whose advice complainants had acted, were, in effect, engaged in a criminal conspiracy to defraud under the cover of the Forest Reserve Act, is, in view of the judicial history of the litigation under that Act, more incomprehensible, if possible, than the Court's action in regard to the witnesses.

Complainants had been advised by their counsel that under the Forest Reserve Act they could lawfully acquire title to land in the oil producing section of the country, upon which land oil, at the time of the selection under the Forest Reserve Act, had not been found, and that such land was, in the eye of the law, agricultural land, and that title thereto as agricultural land could be acquired. Whether claimants and their counsel were, or were not, right in that construction of the Act is the question now before this Court for determination. And wherein did the learned Circuit Judge find a warrant for asserting that to hold this view of the law, and to act upon it, was fraudulent, and complainants and their counsel conspirators? The law officers of the Land Office have held, in the main, that the law means what claimants say it means; upon the hearing in the Circuit Court of Appeals his Honor, Judge Gilbert, than whom the Court of Appeals for the Ninth Circuit has no abler member, fully sustains complainants' contention; and, as we have seen, the learned Circuit Judge, who, in rendering his opinion in this case, so violently scored complainants and their counsel, did himself, only seventy-five days before, in the Olive Company case [103 Fed. Rep. 568], after,

as he informs us, a careful consideration of the law, hold that complainants, in their construction of the law, were right in every essential particular. It would seem, then, that there was some justification for complainants and their counsel in reaching the conclusion that they did as to the meaning of the law. And if there was such justification, how is the door open to any judge to say that in acting upon a construction so justified by judicial opinion they were acting dishonestly or attempting to defraud?

That different minds may honestly differ as to the construction to be put upon the Forest Reserve Law, or, for that matter, upon any law, is the history of our profession, and no more forceful example of the truth of this can be found than in the case of the learned Circuit Judge in whose Court this case originated; for we know that just seventy-five days before the rendition of the decision which we are now criticising Judge Ross had, in the earlier Olive Company case, announced views the very opposite of those to which he gave expression in this case. It does not follow from this, however, that this change of mind was the result of any improper motive, or because of any improper consideration, and we have no doubt that a suggestion to that effect would be met with a very prompt reprimand. And for the same reason that such a suggestion from complainants or their counsel would meet with a prompt reprimand, we, upon behalf of complainants and complainants' counsel, against whom the criticism of the learned Circuit Judge was directed, take the liberty of protesting, upon the record, against the uncalled for, and wholly unwarranted, charges thus judicially leveled against them.

In view of the odium left upon complainants' cause by these judicial charges, we deem it but an act of simple jusitice to complainants to state to this Court

that the subsequent judicial history of this Grand Jury investigation—launched by the Circuit Judge with such defamatory publicity—was subsequently cut short, by the District Judge instructing the Grand Jury that they were without power to base any indictments for perjury upon the alleged false affidavits, for the reason that the Circuit Court had held that it was without jurisdiction of the controversy in which such affidavits were made. It will thus be seen that the Circuit Judge—whether with or without jurisdiction—exercised his power to blacken with the stigma of fraud and perjury—both in the public mind and in the judicial reports of the country—the cause of complainants, and on account of such Court's own *claimed* lack of jurisdiction of the controversy, the Grand Jury is afterwards summarily deprived of the power to vindicate complainants' cause, as subsequent events indicate it would have done had it been permitted to act in the premises.

Recapitulation of what we deem the fallacies upon which the opinion of the Circuit Court rests.

In concluding our review of this opinion, we will briefly sum up the fallacies upon which in our opinion its conclusions rest.

First, that the taking effect of a Forest lieu selection is postponed until the date of its approval, not because of *the existence of the right of approval,* but because such right is conferred by means of a formal administrative rule, rather than by general statutory authority.

Second, that extending the homestead law to *all* "unappropriated public lands" instead of *such* "unappropriated public lands" as were formerly "subject to pre-

emption," has narrowed rather than enlarged the scope of the law.

Third, that land is not "open to settlement" under the townsite laws, until it is within an existing townsite, or in other words, that it is not "open to settlement" until it has already been settled upon.

Fourth, that the purpose of a selector is *immaterial* if admitted by *pleadings,* but is *vital* if shown by *affidavit.*

Fifth, that false statements of immaterial matters defeat plain, positive rights otherwise existing, and become fraudulent even against parties not affected thereby.

Sixth, that injunction will lie to prevent an injury only threatened, but will be denied, if the injury is in process of execution.

Seventh, that the conduct of complainant's predecessors in interest and their counsel should be denounced as *unlawful* and fraudulent, for following the course judicially outlined and sanctioned by the same learned judge seventy-five days before.

Eighth, that witnesses testifying by affidavit only in the initial stages of an important controversy should be stigmatized as perjurors—without a hearing and solely upon the affidavits of other witnesses—and turned over to the investigation of a grand jury, under the guidance of an adversely interested District Attorney.

VII.

THE ADDITIONAL RECORD PRINTED BY APPELLEES CONTAINING THE AFFIDAVITS USED UPON THE APPLICATION FOR PRELIMINARY INJUNCTION.

We have already stated that the appeals in these cases are only from the order of the Court sustaining the demurrers to complainants' bill, and from the order dismissing such bill, and are not from the order denying temporary injunction or refusing to appoint a receiver. That appellate Courts will not reverse trial courts in their rulings on applications for temporary injunctions—if there is any substantial conflict of testimony—is so well settled that appellants did not appeal from the order of the trial court denying temporary injunctions, or denying appointment of receiver, but appealed solely from the Court's ruling sustaining demurrers to, and dismissing complainant's bill. Under the circumstances, it was entirely unnesessary to take to the appellate court the affidavits used on the application for temporary injunction, but nevertheless, the trial court, after the appeal had been taken and perfected, by its order compelled this to be done, and it was done by appellant at heavy expense, but appellants declined to print in the Circuit Court of Appeals such additional record in case No. 217, but did print the additional record in No. 218, and appellants have brought this additional record to this court, but have declined to print the same here, on the ground that it has no bearing upon the issues before the Court on the appeal under consideration. This additional record has been printed at the expense of appellees and they will doubtless attempt to inject it into this case for some purpose.

As we do not on the appeal taken, attack the order of the lower court denying our motion for preliminary injunction, we insist that so much of the record as was applicable alone to that motion has no place in the record here, and that the same would only serve to encumber the record and to obscure the real issues raised by the appeal. We have seen fit to come to the appellate court upon the record as made by the bill and demurrers, and the extensive record which has no bearing whatever upon the questions raised by the demurrer to the bill, has no place in this appeal. We claim that the trial court had jurisdiction of the subject matter of the suit, and that the bill stated a good cause of action in equity, and hence that it was error to sustain the demurrer and dismiss the bill. No matter what showing may have been made by defendants on the application for injunction, complainant was clearly entitled to go to trial if the bill stated a good case.

We maintain, however, as above stated, first, that the record which we have brought here and printed, is all that is necessary to enable this court to pass upon the points raised by the appeal, and secondly, that the order of the lower court sending the additional record to the Circuit Court of Appeals was without jurisdiction and therefore void.

The Circuit Court of Appeals purports to have considered these cases solely upon the record as made by the bills and demurrers thereto, and in no wise considered the affidavits used upon the application for tempopary injunction, and did not order or suggest that the additional record in case 217, which appellants had been compelled by the Circuit Court's order to bring up—should be printed. In fact, it was too plain for controversy that the appeal was not from the order denying the temporary injunction or the receivership.

The Court of Appeals correctly states the scope of the appeal as follows:

> "This appeal is taken only from the order and decree sustaining the demurrer and dismissing the bill. The discussion of these questions will be confined to the facts alleged in the bill."

And the court then states the only questions involved in the appeal as follows:

> "Did the Court err in sustaining the demurrer? Did the Court err in dismissing the bill?"

Upon the first point, we refer the Court to the case of Nasua v. Boston & L. R. Corp., 61 Fed., 37, where it is held that only such papers should be inserted in the transcript on appeal as are necessary to the hearing, and that the appellee, if the transcript is defective, must resort to *certiorari*, or suggestion of diminution of the record, in the Appellate Court, and not to a motion to dismiss the appeal, and that the clerk of the lower court in making up the record, is ordinarily to be guided by the instructions of appellant's counsel. In the course of the opinion, the court said:

> "Take the case of a defendant in equity, who has pleaded to the whole bill and whose plea has been overruled as a matter of law and has been followed by voluminous proofs on the issues of fact raised by the bill and answer. *He may be content for his appeal to rest on his plea, and in that event he neither need nor ought to bring here the mass of proofs following it.* This conforms to the ruling in Railway v. Dinsmore, 108 U. S., 30, where apparently, the case was disposed of on demurrer, and the Court held that the evidence on file was not to be brought before it. And it is emphatically enforced in those cases where the Supreme Court has condemned the bringing up of unnecessary papers and proceedings."
>
> [Citing Railway Co. v. Stewart, 95 U. S., 279-84; Craig v. Smith, 100 U. S., 226, 330; The

Adriatic, 103 U. S., 730; Ball & Socket Fastener Co. v. Kraetzer, 150 U. S., 111, 118].

Upon the point that the lower court had no jurisdiction after the appeal had been taken and the record lodged in the appellate court, to make any order in the premises we cite Smith v. McIntyre, 84 Fed., 721, where the trial court said:

> "What shall constitute the record of the appellate tribunal is a matter wholly within the control of the appellate tribunal itself, and not of this court, as has been well pointed out to the plaintiff by the presiding judge of that court."

Upon this point we refer also to Burnham v. Ry. Co., 87 Fed. 168, where the Court of Appeals for the Seventh Circuit holds that the jurisdiction of the Appellate Court attaches upon the filing of the writ of error in the office of the Clerk of the Circuit Court, and is not defeated by irregularity in the transcript or in its certification.

That appeal lies direct from the Circuit Court to the Circuit Court of Appeals, both upon the question of jurisdiction and upon the merits, see Lake National Bank v. Wolfeborough Savings Bank, 78 Fed. Rep., 517-518, where the court says:

> "In McLish v. Roff, 141 U. S., 661, 12 Sup. Ct., 118, it was held that an appeal to the Supreme Court under Section 5 only lies after final judgment, and that at that time, the party against whom the judgment of the court has been rendered has his election either to take the question of jurisdiction alone directly to the Supreme Court, or to appeal to the Circuit Court of Appeals upon the merits of the case, as well as upon the question of jurisdiction. In the latter event, the Circuit Court of Appeals has authority to pass, not only upon the merits of the case, but also upon the question of jurisdiction, and it may then, if it deem proper, certify the question of the jurisdiction of the Supreme Court."

We submit that as our appeal raises no question not presented by the bill of complaint and the demurrers thereto, it was only necessary to bring up to the Circuit Court of Appeals or to this Court the bill of complaint and demurrers, and the order and decree of the lower court entered thereon. This has been done, and it would only encumber the record, cloud the real issues raised by the appeal, and increase the labor of this Court to consider the voluminous record containing the affidavits on the motion for preliminary injunction, as the correctness of the ruling of the court upon such motion is not raised or questioned on this appeal.

VIII.

THE JURISDICTION OF THE COURT.

The primary question, in all cases when raised, is that of jurisdiction. The present case is one of first intention in one respect: in that, if complainant's contentions are well founded as to the meaning or proper definition of "vacant land open to settlement," it has a complete equitable title to the land in question which because of an erroneous definition by the Land Department of the legal meaning of the word "vacant,"—purely an error of law,—will never be permitted to ripen into a legal title, and defendants are in possession despoiling its lands, protected by such error so that complainant can never sue the spoliators at law, nor,—if a court of equity has no jurisdiction until legal title passes out of the United States,—can it ever have a remedy, because defendants need never apply for or take title, or become amenable to the courts. Thus a pure error of law by an administrative officer of the government would close the courts from giving relief, and would turn complainants' property over to a tres-

passer to be despoiled and exploited with absolute impunity.

The Circuit Court in these cases held in effect that it had no jurisdiction of the controversy, yet passed upon every question of law and fact involved. The Circuit Court of Appeals held that it was without jurisdiction *to quiet title* pending the decision of the Land Department as to the respective rights of the parties, but held it had jurisdiction by injunction and receiver to protect the property from spoilation and waste, pending the action of the Land Department on the title, provided complainant showed a sufficient equitable interest in the property; but then held that complainant's bill did not show such equities, and for that reason, and not on account of lack of jurisdiction, complainants were denied relief. Our opponents, however, stoutly assert that there is no jurisdiction in a federal court of equity, by injunction or otherwise, to protect property from waste, and spoliation and to preserve the *status quo* at the instance of the equitable owner, while proceedings to determine to whom the legal title shall issue, are pending in the land office.

This question we will now consider.

The logical order of inquiry is: 1st. Have the Federal Courts in Equity, jurisdiction by injunction and receivers to conserve property in public lands pending proceedings instituted in the Land Department to acquire legal title? 2nd. In such action are the facts and law of the claimant's case examinable by the Court?

1st. The Federal Courts have jurisdiction in equity by injunction and receivers to conserve property in public lands pending proceedings in the Land Department to acquire legal title.

It is a maxim that equity will not suffer a wrong to be without a remedy. Commenting upon this maxim, Bispham, [Principles of Equity, 6th. Ed., Sec. 37], says:

> Whenever, therefore, an infringement of legal rights of a civil, as distinguished from a criminal, nature, exists, for which there is no other adequate remedy, a court of chancery will be ready to afford one and to make that remedy complete.

And under the head of remedies in equity for protection of legal rights the author [*ib.* sec. 460] says:

> Another class of cases in which equity interferes is where property, which is the subject of litigation, is in danger of injury and the interposition of the Court is necessary for its protection. It will be remembered that technical waste could only exist when the party committing it was lawfully in possession, and that, therefore, if his claim was hostile the remedy by injunction against waste, strictly speaking, did not lie.
>
> Where, however, special circumstances exist, as when the party in possesion is insolvent, and unable to respond in pecuniary damages; *or where his actions are such as to deprive the land of its chief value, an injunction may issue to protect the property pending litigation. This is especially so in the case of mines, for there the injury goes to the very substance of the estate.*

The conserving power of a Court of Chancery is not limited to cases in which action is actually pending, but extends to cases wherein adverse rights are asserted whether action be actually pending or not.

Nautahala Marble & Talc Co. v. Thomas, 76 Fed. 59, and Thomas v. Nautahala Marble & Talc Co., 58 Fed. 485 C. C. A., illustrate this power of chancery. Both parties claimed legal right. The Court on dismissing the cross-bill ordered [76 Fed. 66]:

> That the injunction issued be continued and matters remain in *statu quo until the question of title be settled by action at law or otherwise.*

Northern Pacific R. R. Co. v. Hussey, 61 Fed. 231, was of the same kind. The plaintiff was entitled by its grant to the odd numbered sections, when they should be surveyed, in a large tract of unsurveyed lands. Plaintiff's particular lands were not segregated from the mass. No action at law for trespass or ejectment could be brought by plaintiff. Defendant was felling and removing timber. The Court, *ib.* 235-6:

> The bill shows that the lands in question are alone valuable for the timber that grows upon them. To cut down, destroy or carry away the timber thereon is therefore essentially to destroy and take away the very substance of the estate. That an injunction would be awarded in behalf of one showing the necessary interest in the property to avoid such waste and destruction is thoroughly settled.

Lanier v. Allison, 31 Fed. 100-102, was of the same class. The syllabus states that:

> In the cases where irremediable mischief is being done, or threatened, such as the extraction of ores from a mine, or the cutting down of timber

> an injunction will issue, though the title to the premises be in litigation.

It is evident, however, that no suit at law to settle title was pending as the Court upheld the injunction, denying the other relief prayed for and directed complainant to proceed at law for assertion of title and for mesne profits, which would not have been done were complainant then so proceeding.

Northern Pacific R. R. Co. v. Souderberg, 86 Fed. 49-51, was like that against Hussey, *supra*, except that the locus was a granite quarry. The Court held, *ib.* 51:

> This suit has reference to unsurveyed land, the mineral or non-mineral character of which has not yet been determined. The Court will not, at this time, offer advice to the Land Department by deciding the question [of mineral character] in advance. However, the complainant has an interest in the odd-numbered sections within its grant entitling it, *while questions as to its title are in abeyance,* to preventive relief by injunction to restrain the commission of waste, as by the cutting or destruction of timber, the mining and extracting of coal, the quarrying and removing of building stone, or the destruction of native grass giving value to lands for grazing purposes, or other like acts calculated to work irreparable injury to the land itself.

Johnson v. Hughes, 58 N. J. Eq. 406, was an action in equity to enjoin a destructive trespass in cutting down advertising signboards. Both parties claimed complete legal title and actual possession. No action at law had been brought by either party. Objection was made to the jurisdiction on this ground. The Court held that:

> "There is no question of an equitable estate, or of fraud or trust or other matter of an equitable nature in this case. The title asserted on each

side is the holding of a legal estate * * * antagonistic to the legal estate held by the other. * * * P. 408—As late as the time of Lord Thurlow injunctions were refused in such cases. But the evident injustice of permitting the actual destruction of the subject-matter in dispute during the delay necessarily incident to the establishment by judicial determination of the rights of the parties, led the equity courts to interfere, *not to decide the dispute as to the legal title but to save the property from destruction* until the law courts should, by a proper proceeding, adjudge the rights of the parties. * * * The jurisdiction assumed by the courts of equity in such cases is not for the determination of the controversy as to the title, but simply for the preservation of the subject-matter in dispute from destruction; and in the English practice, the complainant who claims the intervention of this court is put under terms that he shall within a proper time, bring such suit in the law courts as may be necessary to establish his rights.

So that, though no proceeding is pending in another tribunal to determine title, the court of chancery still has the jurisdiction to *conserve property*, the title to which is claimed by a complainant, until he can, in a proper tribunal, by suit at law, have his rights adjudicated.

Wood v. Murray, [85 Iowa, 505] was a suit essentially like that at bar. The plaintiff was seeking title to public land through the Land Department, and the suit was for an injunction to restrain defendant from interfering with plaintiff's possession. The Court held:

> It will be observed that neither party has acquired title from the United States. Appellant contends that as the legal and equitable title remains in the United States, the courts have no jurisdiction to determine which party is entitled,

upon compliance with the law, to receive a patent from the United States. * * * The case before us is not a contest as to title, nor as to which party is entitled, upon full compliance with the law, to receive a patent from the United States. It is simply a question of whether under the present circumstances the defendant should be restrained from interfering with plaintiff's possession pending the determination of her rights by the Secretary of the Interior. The preemption by Mr. Wood being the first in point of time, and sustained by the Commissioner of the General Land Office, as superior to defendant's claim, possession thereunder should be protected pending the appeal to the Secretary; to do so does not in anywise attempt to control the action of the Department, nor determine the question before it. It simply maintains the *statu quo* until their rights are determined by the proper tribunal. [Bettman v. Harness, 42 W. Va. 433, Syl. 36, L. R. A. 566.]

Equity has jurisdiction, by injunction to prevent acts of irreparable injury to land, even though there is controversy as to title between the parties; and having jurisdiction on that ground will go on to give full relief, though in so doing it may be necessary to decide between two adverse titles. An unlawful extraction of petroleum oil or gas from land, they being part of the land, is an act of irreparable injury; equity will enjoin it.

In the opinion, *ib.* 439, the Court says:

Here there is a wilderness of decisions, variant and indefinite, arising from the difficulty encountered by the courts, in the effort to at once recognize the rule that equity will not try land title and deprive a party in possession of its benefits, and on the other hand the rule that irreparable injury will be stayed by injunction. Take the case where irreparable injury is being done to land under two hostile titles. One party files a bill of injunction showing on its face a clear title, and the other answers showing clear title *prima*

facie. Will you at once dissolve the injunction and send the party to try his title at law, from the fact that there are adverse claims, when, in fact, the plaintiff ultimately shows or could show, the better title? Much law could be found to answer "yes." I think the true answer to that question is "no." Where there is irreparable damage injunction lies though there be conflicting titles. Erhardt v. Boaro, 113 U. S. 537; Iron Co. v. Reymer, 17 N. Y. 765; Note to Jerome v. Ross, 11 Am. Dec. 506.

In Olive Land & Development Co. v. Olmstead, 103 Fed. 568, an injunction was issued for conservation of the property, at the suit of a forest lieu selector against an oil placer locator, pending a land office contest; a case essentially similar to those at bar.

A similar case,—a State Board standing in place of the Land Office,—arose between a tide-land claimant and an alleged trespasser. In West Coast Impvt. Co. v. Winsor, 36 Pac. Rep. 441-442, 8 Wash. 490, the Court held:

> It is no doubt true as contended by appellants, that the question of who shall have the right to purchase, and other matters of that kind, before they can be finally determined, should be acted on by the Board authorized by the legislature; and that as to the final rights of parties to controversies of this kind, the courts will have no jurisdiction until action has been had by said Board. But it does not follow that during the time intervening between the granting of the right by the legislature and the doing of such acts under said law as will give such Board jurisdiction to determine as to the rights of the parties, the courts have no jurisdiction to protect the enjoyment of the situation which the legislature fairly contemplated should be maintained *until such time as such Board shall have taken action.*

In similar cases of Land Office controversies, the courts of Oklahoma and Montana exercise jurisdiction of this character. Cox v. Garrett, 7 Okla. 375; Calhoun v. McCarnac, 7 Okla. 347; Boyd v. Desrozier, 20 Mont. 444-448. This jurisdiction in case of controversy as to rights claimed in property, for its conservation before suit at law is pending, is the natural corollary to the jurisdiction in chancery, ancillary to that of the courts of law, to protect property until such courts can determine title.

The case of Erhardt v. Boaro, 113 U. S. 538, was one of this kind wherein the Court said that it was reported in 6 Vesey 51, that Lord Elden said that:

> He remembered being told in early life from the bench that "if the plaintiff filed a bill for an account and to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, * * * to issue an injunction, though the title to the premises be in litigation.

The rule applicable in exercise of this jurisdiction is illustrated in Buskirk v. King, 72 Fed. 22, in the Circuit Court of Appeals. Appellant had brought a suit of ejectment for land, pending which he sued in chancery for injunction to prevent removal of timber. The interlocutory writ issued and defendant appealed. The Court held:

> We come now to consider the assignment of error that, in substance, the Court erred in granting the injunction. In doing this, we must keep in mind that courts of equity are not to be regarded as in any manner forestalling the final action of courts of law, and the questions involved,

when they grant the temporary relief afforded by interlocutory injunctions. In doing so they simply adjudge that the plaintiff presents such a case as justifies the court in preserving the *status quo* until a court of law has had an opportunity, with all the facts before it, and the assistance of a jury, of determining the real merits of the controversy. In such matters the plaintiff *is not required to make out such a case as will entitle him to a decree in his own favor on final hearing, and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction was eminently proper* * * * and this is particularly so in cases where the value of the property in dispute consists of timber standing on the land, or minerals under it. In such cases, where both or several defendants claim title to the property in controversy, it is not uncommon to restrain them all from the cutting of timber or the removal of minerals, for the reason that if it is permitted it will result in injury to the rights and interests of the true owner. If the mischief complained of is irremediable and destroys the substance of the property, such as the cutting of timber or mining of minerals and extraction of ores, an injunction restraining such acts will issue in order that the property may be preserved from destruction *during such time as may be necessary to try the title at law.*

Instances of exercise of this jurisdiction are frequent, among which are the following, in addition to those already cited: Wood v. Broxton, 54 Fed. 1005; Toledo, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 746; Union Mill & Mining Co. v. Warren, 82 Fed. 522; Walker v. Emerson, 89 Cal. 456-458; Richards v. Dower, 64 Cal. 62-63; Moore v. Massini, 32 Cal. 590-594; Kittle v. Pfiffer, 22 Cal. 485; Poiser v. Fetter, 20 Kan. 47-49; Hall v. Equator Min. & Lm. Co.,

Federal Cases No. 5931. In the latter case the Court held:

> As the case is now presented, *we have only to await the result of the action of ejectment, and not to attend meanwhile to nicely balanced theories and probabilities, with a view to determining the right to this injunction, and it is enough that there is a strong controversy in which the right of neither party clearly appears. On that alone we interfere to preserve the property for him who may, at law, prove his right to it.*"

If then there be no remedy at law available to complainant, it is clear that it is entitled to the aid of chancery, *if a strong controversy exists and the clear right of neither party appears*, to restrain the acts complained of until the title can be determined by a proper legal tribunal. We maintain that from the allegations of the bills in these cases, which are confused by the demurrers, that not only "*a strong controversy exists*" here, but that the absolute and complete equitable title to the land in controversy is shown to be in the complainant.

No remedy exists at law for the wrongs complained of.

No need exists to cite numerous authorities upon this head for the clear and unequivocal rule of this Court is conclusive against any successful contention that there is at this stage of the controversy or at this time, any legal remedy. It is settled that the holder of an equitable title to lands, the legal title to which is in the government, cannot maintain ejectment in the Federal Courts—except in a few special cases authorized by statute as for instance the possessory action to recover a mining claim under Sec. 910, Re-

vised Statutes. In Carter v. Ruddy, 166 U. S. 493, the plaintiff sued in ejectment to recover lands for which he held final certificate of entry, relying upon a statute of the state, similar to section 1925, Code of Civil Procedure, of California, authorizing suits of ejectment upon a final certificate from the land office. The Court, upon the authority of Langdon v. Sherwood, 124 U. S., 74; and Hopper v. Shermer, 23 How. 235, held that:

> It is the settled doctrine of this Court, that no action of ejectment will lie on such an equitable title, notwithstanding a state statute; the law is only binding on the State courts, and has no force in the Circuit Courts.

The necessity for equitable interference is therefore clear. It is especially so in a case like the present where the defendants assert a claim under the mining laws and need never apply for or take title from the government, but may indefinitely occupy and exploit the value of complainant's land,—the title to which is denied it by the Land Department, based on an erroneous construction of the Act of June 4, 1897,—and while complainant is thus denied title, defendants will not take title but shelter themselves under a misconstruction of law, by an administrative officer of the Government, while they exploit the lands for which the Government has been fully paid by complainant, knowing that if title issued to them they would then be subject to attack in the courts as trustees of title for the complainant. But, so long as the Land Office, if upheld by the courts by denial of jurisdiction, give defendants safe harbor from attack, they may pursue their piracy, so to speak, under the protection of the Federal flag.

In a court of equity mineral claimants will not be heard to say that injunction shall not issue to compel

them to cease wrongful exploration of land, merely because they do not take out the legal title and thus quit the neutral part, and expose themselves to process under the hostile flag of a legal title, which can be attacked by the equitable owner of the land; but, on the contrary, the Federal Court of Equity, in such cases will disregard the fact that the legal title is still in the Government, and the fact that the equitable owner cannot maintain an action at law to recover posssesion; and (upon the broad principle that wherever a plain right is being infringed or impaired, and *there is no adequate remedy at law*, that it is the peculiar duty of a court of equity to afford the protection which the situation demands), will by injunction or receiver, or both, protect the equitable title, and preserve the property from spoliation and waste until the legal title issues.

The situation requires such action to give adequate relief, as defendants, sheltering themselves under a title held by the United States, are beyond reach of process from a court of law to test their right. But in such case it is within the powers of chancery to so restrain them. As said by the Court in Toledo, etc., R. R. Co. v. Pennsylvania Co., 54 Fed., 746, 751:

> Every just order or rule known to equity was born of some emergency to meet some new conditions and was therefore, in its time, without precedent. If based on sound principles and beneficial results follow their enforcement, affording necessary relief to one party without imposing illegal burdens on the other, new remedies and unprecedented ones are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief.

In Waterloo Mining Co. v. Doe, 82 Fed. 45, by the Circuit Court of Appeals, no action at law was pending. Neither party had patent, but both had certifi-

cates of entry and the Mining Company received patent pending the suit and urged upon appeal that there was no equitable jurisdiction to grant an injunction because the validity of its legal title had not been adjudicated. The Court held that this was a rule of expediency and policy, not of jurisdiction, [*ib.* 48-9], and that equity had jurisdiction and might properly exercise it; that if title was not put in issue by plea, objection, on that ground, to the jurisdiction, was waived; that enough was stated in the bill to warrant an injunction, *pendente lite*, had an action at law been pending. The injunction was continued in force.

In the present case the title alleged is admitted by the demurrer to the bill, if the facts stated give, under the Act of June 4, 1897, an equitable title to the land.

In the present case no action at law can be brought. Complainant has omitted nothing it can do to assert title and to protect its right. It has proceeded as far as it can under existing law and is without remedy other than that here sought. It cannot appeal from the Secretary of the Interior who has misinterpreted the law—nor are the courts of law open as the government holds legal title and the defendants do not take it out.

As the action at law cannot be maintained in the federal courts, they should take jurisdiction to extend equitable relief for its conservation until such time as the legal right can be determined.

The case of Davidson v. Calkins, 92 Fed. Rep., 230, decided by District Judge Wellborn, is relied

upon by appellees, as showing that the Court was without jurisdiction of this suit, but is not authority in this case, for several reasons:

First. It was not brought to obtain an injunction restraining waste or trespass while the title to the property was being settled in the proper tribunal.

It was not auxiliary to any pending suit or other legal proceeding in which the title to the property was being adjudicated.

Second. In that case an action of ejectment would lie. The Court in the progress of the opinion admits jurisdiction in the Federal Court as a court of equity in aid of a suit at law to try title, and says:

> "When ejectment is pending in a Federal Court, the Court may, on its equity side, by injunction or otherwise, protect the property until the common law action is disposed of.
>
> Buskirk v. King, 18 C. C. A. 418; 72 Fed. 22.
>
> It is also true that ejectment will lie for a mining claim, although the paramount title be in the United States.
>
> Rev. St. U. S., Sec. 910.
>
> No such suit, however, is here presented. The case at bar is not auxiliary to any action pending on the law side of the Court, but is an independent suit to quiet title, in which complainants seek a temporary injunction against threatened waste by the defendants, who are in possession of the property."

In that case the Court held that injunction was not proper, because *an action at law by ejectment would lie,* and if the remedy thus offered was not adequate, that the auxiliary relief of injunction could be had in aid of the ejectment suit. But in this case, no such situation is presented, as a suit at law will not lie—complainants not having the legal title and there being no Federal Statute that will permit ejectment

here. Section 910, Rev. Stat., permitting ejectment to recover a mining claim, does not aid the complainants in this case, and, furthermore, these suits, while not in aid of pending actions of ejectment, are in aid of proceedings to determine title pending in the proper tribunal, having jurisdiction over the subject matter, and are necessary to preserve the property from destruction in the meantime.

While we do not take issue with the conclusion reached by Judge Wellborn in Davidson v. Calkins, yet we think he puts his reasoning upon too narrow grounds. The "crucial question" in such cases, as said by the Circuit Court of Appeals for the Fourth Circuit, in Hardens v. Guice, 81 Fed. 162-164, is:

> "Is this suit a suit cognizable in equity, or *has the complainant a plain, speedy and complete remedy at law?*"

Judge Wellborn narrows this "crucial question" down to the one question as to whether or not defendant is in possession and says:

> "If he is not, there is no adequate remedy at law, and his suit in equity will lie; if the defendant is in possession, ejectment is appropriate, and the interposition of a court of equity is forbidden."

This language and reasoning was broad enough for the case there before the Court, for in that case ejectment would lie, *because the statute particularly authorizes it*, although the paramount title was in the Government; but, in a case like the present one, where ejectment will not lie, and there is no remedy at law, a court of equity has jurisdiction. The mere *possession* of the defendants does not prevent the exercise of such jurisdiction in a case where there is no remedy at law.

2nd. In the exercise of its jurisdiction to conserve property until legal title can be ascertained a court of equity must examine the facts and law of complainant's case and interpret the law upon which the rights asserted depend.

The granting of equitable relief in cases where the Federal Courts' Jurisdiction depends, as in this case, on diverse citizenship, is somewhat dependent on state legislation and practice: thus in Gormley v. Clark, 138 U. S. 338, this Court held:

> It is strenuously insisted that the remedy at law was adequate and that as the right of possession was purely a legal question, and for a jury, the court of chancery should have declined jurisdiction; but insomuch as the case comes within the provisions of the statute, and equity could alone afford the entire relief sought, the fact that legal questions were also involved could not oust the court of jurisdiction. The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the circumstances. Kilbourn v. Sunderland, 120 U. S. 505-514. * * * And, as already stated, *we administer, where diverse citizenship gives us jurisdiction of a case, the equitable relief which State legislation accords.*

Sec. 526 of the Code of Civil Procedure of California provides that:

> An injunction may be granted * * * when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff.

Under this section one may have an injunction to restrain waste in an action of ejectment for recovery of real property, under the practice in California. In Hunt v. Steese, 75 Cal., 620, an action of ejectment to recover possession, plaintiff moved for an injunction which, after a temporary restraining order was denied. The Supreme Court reversed the order denying an injunction and held that:

> Not only should there be an answer to the merits, but *it should be made reasonably certain* by the pleadings and the affidavits *that the attack upon the patent will be ultimately successful, or the injunction should be granted.*
>
> In all cases of this kind *an injunction should be granted* pending the determination of the issue as to ownership *unless it appear that the plaintiff's title is bad, or at least that there is no reasonable ground for the assertion of title by the plaintiff.* The mere existence of a doubt as to the title does not of itself constitute a sufficient ground for refusing the injunction.

The following decisions in that State support this rule: Hess v. Winder, 34 Cal., 270; Porter v. Jennings, 89 Cal., 440; Bullar v. Kempf, 119 Cal., 9.

There being no remedy at law in the Federal Court, there was,—under the doctrine of Gormley v. Clark, *supra*, and the law and practice of California,—jurisdiction in chancery, in the Circuit Court to administer the relief, and the injunction should have been granted unless it appeared that there was no reasonable ground for the assertion of equitable title by the plaintiff. It is evident that if a Court have jurisdiction to grant a particular relief, and is called upon to exercise it, of necessity it must examine the facts and law upon which that relief is asked. A court cannot act judicially except *upon consideration* of the facts upon which the relief is asked and the law applicable there-

to. This the Circuit Court of Appeals, as we have seen, in fact did.

The Court, however, having only an ancillary jurisdiction, does not bar the parties by its findings of fact *nor is the strictness, or degree of the proof, required to be as cogent* as upon a trial of the facts in a court of law, for final adjudication of the rights of the parties. The complainant must make a *prima facie case, not a clear and conclusive one.* This is well stated in Buskirk v. King, *supra,* that:

> *"the plaintiff is not required to make out such a case as will entitle him to a decree in his own favor on final hearing,"*

and in Hall v. Equator Min'g & Sm. Co., 5931 Fed Cases. That in such case the Court does not in weighing the evidence and arriving at a tentative finding of the facts, give attention to nicely balanced theories and probabilities with a view to determining the right to the injunction, and *it is enough that there is a strong controversy in which the right of neither party clearly appears.*

But here no difficulty exists as to any disputed question of fact. The facts stated by the bill are confessed by the demurrer and the Court is only called on to apply the law to the admitted facts. This the Circuit Court of Appeals did, but it is insisted erred in its construction of the law.

CONCLUSION.

It follows that the mining locations were, for want of a discovery, utterly void; and for lack of such discovery the land was non-mineral, and hence was "open to settlement," and such locations not being entries on the Land Office records, the land was "vacant," and such locations were no obstacle to the selection of the land by the Forest Lieu selectors under the act of June 4, 1897.

On the other hand it is conceded by the demurrer, that while the land was standing subject to disposal, —no mineral right having attached for want of discovery—complainants' grantor accepted the proposal for exchange, conveyed good title to the Government to lands it solicited of him, filed evidence of such fact in the local Land Office as the Government directed, and selected this land as that he desired in exchange; which the local office accepted and certified as free from conflict, and that there was no adverse filing, entry or claim thereto; that afterward the defendants came on the land with machinery, explored, without his consent, and found mineral, which they are marketing from the land to their own use, excluding the complainant, who now has the selector's right.

We submit that on such facts the jurisdiction and power of chancery is undoubted and ample to restrain such exploitation, and to conserve the property by aid of a receiver until such time as one party or the other obtains legal title to it from the government, so that legal title may be made the subject of adjudication in a proper court.

That this Court as the ultimate tribunal will review the admitted facts and apply to them the act of June 4, 1897, giving it the proper construction, defining vacant according to its true import, and deciding that it has no reference to mere *occupancy* of land, de-

fining the rights of prospectors, and deciding as heretofore, that prospectors without discovery obtain no rights, and can make no valid mineral location; and that the equitable right to title vests, under the act of June 4, 1897, at the time of selection at the local land office, when the selector shall have filed there his deed of relinquishment to the United States, of land embraced in a Forest Reserve, with evidence of title thereto good and unincumbered, and selects in lieu thereof any land, not then known to be mineral, and then free of any valid claim initiated under the public land laws:

That the decree dismissing the bill will be reversed and the cause remanded with direction to overrule the demurrer, grant the injunction prayed and to appoint a receiver for conservation of the property until one of the parties obtain legal title thereto, and that complainant recover its costs in the Circuit Court of Appeals, and in this Court.

Respectfully submitted,

JOHN M. THURSTON,
JEFFERSON CHANDLER,
T. C. VAN NESS,
SHIRLEY C. WARD,
Solicitors for Appellant.

M. A. BALLINGER,
HORACE F. CLARK,
WILLIAM C. PRENTISS,
Of Counsel.

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APPENDIX.

DIVISION I.

As showing the views of the Senate Committee on Mines and Mining as to the meaning of the word "vacant," and as evidencing the extent to which the placer mining laws are being abused in California to monopolize supposed oil lands, we submit the following report of the Senate Committee on Mines and Mining, made February 23, 1901, to accompany Senate Bill 5589:

Mr. Stewart, from the Committee on Mines and Mining, submitted the following report. [To accompany S. 5589.]:

The Committee on Mines and Mining, to whom was referred the bill (S. 5589) to amend the mining laws of the United States, report it back with an amendment in the nature of a substitute. The committee also report the results of its investigations made in pursuance of the following Senate resolution:

Whereas it is alleged that mining locations are made in great numbers under so-called powers of attorney, in violation of the principles of the mining laws of the United States, and also that large tracts of land where no mineral discoveries have been made are located as placer claims, and thereby monopolizing without right the public domain: Therefore be it

Resolved, That the Committee on Mines and Mining be, and it is hereby, directed to investigate these matters and report by bill or otherwise.

The intent and meaning of the mining laws have been wholly disregarded in locating placer mining claims in Alaska and in the location, or the attempted location, of oil lands in California. In Alaska single individuals, by means of powers of attorney and other devices, monopolize vast tracts of mineral lands upon which no labor is performed. The evidence before

the committee shows that in Alaska the land, by means of such expedients, has in some instances been sequestered from immediate public use along creeks for 30 miles by a single individual. The monopoly of mining lands in Alaska by such devices has greatly retarded the development of the country and deprived bona fide miners of the opportunity to explore and develop mines and obtain title thereto. Under the present law locations made early in January remain valid for about two years, with no development work whatever being performed, and bona fide miners are compelled to buy off the shadowy claims of fraudulent locators to obtain ground upon which to prospect for the precious metals. This condition of affairs has naturally retarded the progress of the Territory and inflicted great injustice upon the working miner.

The bill reported by the committee repeals all laws allowing one person to locate for another, and requires $100 worth of development work upon each location within a year from the date thereof, and on all claims heretofore located it requires the development work to be done before the 1st day of October, 1901, and in every year thereafter.

In locating claims containing petroleum and other oils, the committee finds that the abuse of the law has been even more flagrant. In California a few persons have attempted to locate hundreds of thousands of acres of petroleum or oil lands under the placer mining laws; and petroleum discoveries have only been made or attempted upon a very small percentage of these claims. We find that the existing placer mining laws, which the courts and the General Land Office hold to require an actual discovery of mineral or petroleum as the very basis of a placer mining location, are not adapted to the acquisition of petroleum lands, owing to the fact that petroleum, unlike placer gold, is rarely found upon or near the surface, and can only be discovered by expensive drilling operations. Hence these laws do not apply or give rights to the prospector prior to the actual discovery of oil during the time necessarily consumed in drilling discovery wells. As the claimant acquires no right by the mere attempted

location, prior to an actual discovery of mineral or oil, his claim is subject to exploration by any rival claimant, and the first to discover mineral or oil will acquire the better title, regardless of the priority of attempted locations. Where the lands in question are *returned as agricultural, they are, notwithstanding their undiscovered or supposed mineral character, in law non-mineral prior to discovery of mineral or oil; and although in the possession of the mineral claimant, they are vacant and open to settlement and subject to acquisition under any general or special land laws, entries under which operate as immediate purchases from the Government. Under this head come military bounty land warrants, Sioux half-breed, Porterfield, and other scrip, forest lieu-land selections, etc. The rights of parties acquiring title under these laws depend upon the known character of the land at the time of entry or selection under such laws. Such* lands are open to entry under the homestead law, and the homesteader may, by injunction, prevent mining explorations even while his title is inchoate, and prior to the making of final proof. If, however, mineral or oil is discovered prior to final proof, showing the lands to be more valuable for mineral or oil than for agricultural purposes, it will defeat the homestead title, although no discoveries made after final proof affect the homesteader's right.

It is therefore clear that lands supposed to be valuable for oil, but upon which no oil has been discovered, are open to acquisition under the agricultural land laws; but these laws alone are not adequate to meet the situation, as such scrip, land warrants, and forest reserve lands, with which supposed oil lands may be acquired, are limited in quantity and held by private parties, and therefore not readily obtainable.

In view of these considerations, your committee believes that the placer mining laws are not applicable to lands supposed or believed to contain petroleum, but upon which no discoveries have been made. The practice of using those laws to monopolize large areas of land, without title and without assurance of protection to those exploring and investing thereunder, op-

erates to retard rather than to advance the development of the oil resources of the country, and leads to strife and contention.

Your committee believes that an opportunity should be given to purchase from the Government such lands, in limited quantities, to those who make affidavit that the same is believed to be valuable for petroleum. The bill which the committee presents is intended to permit this without interfering with the right to acquire under the placer mining laws lands upon which oil discoveries have actually been made, as it is only to such lands that the existing law is applicable. The committee's bill gives the privilege of purchasing lands which are believed but are not known to contain oil, in tracts of from 10 to 160 acres, at $2.50 per acre.

[Attached to such report as a part of the testimony on which it is based is the following:]

Statement from official records showing extent to which the petroleum placer mining laws are being abused as a means of monopolizing the oil lands in Kern and Fresno counties, Cal.

SUMMARY.

The following sworn statement, tabulated from the official records of Kern County, shows that in that county alone, within a year, 103 persons have located 8,248 placer petroleum mining claims of 20 acres each, an average of over 80 claims, or 1,600 acres to the person, or a total of 164,960 acres:

In this list appear the names of 5 persons whose claims number between 200 and 250; 7 between 150 and 200; 13 between 100 and 150; 41 between 50 and 100; 37 between 30 and 50.

This list shows the following number of claims located by single families:

Three of the Jameson family have located 220 claims, or an average of 73 each; 6 of the Prewett family have located 565 claims, or an average of 94 each; 7 of the Richardson family have located 885 claims, or an average of 126 each, and 4 of the Wrampelmeier family have located 292 claims, or an average of 73 each.

Those holding less than 30 claims each are not shown in this list.

Name.	No. of Claims.
Adams, John	64
Armstrong, R. B.	54
Batz, J. B.	153
Berry, W. J.	31
Bernard, E. M.	47
Beverage, Geo.	64
Bilkey, C.	58
Bissell, W. S.	86
Blanding, Gordon	46
Blodgett, H. A.	234
Bracewell, J. M.	75
Bernard, James	43
Calcote, Dan	39
Carson, J. M.	75
Clark, C. T.	48
Congdon, C. H.	43
Congdon, H. B.	31
Crites, Phœbe J.	54
De Groot, W. E.	43
Druillard, S. G.	42
Drum, F. G.	46
Emmons, E. J.	75
Emmons, M.	31
Emmons, W. H.	65
Farnum, N. C.	185
Fewell, W. G.	36
Goldman, I.	35
Gould, J. L.	59
Graham, F. M.	137
Gurnett, A. G.	65
Hailstone, C. E.	81
Hendryx, W. A.	71
Hodgkiss, O. E.	33
Hughes, J. A.	40
Jameson, J. M.	45
Jameson, J. S.	52
Jameson, J. W.	123
Jastro, H. A.	30
Jewett, S.	228
Jordan, J. H.	160
Keller, F. L.	42
Kellogg, L. O.	34
Kennison, A. W.	58
Kowdy, C. E.	73
Langdon, F. A.	31
Landis, J. B.	62
Lange, H. T.	40
Lee, C. A.	117
Lemon, F. H.	52
Lhote, H. C.	55
Lindsay, G. J.	76
McCutchen, G. W.	49
McCutchen, J. B.	47
McCutchen, W. S.	36
McKee, Robert	
Mentry, C. A.	34
Moran, Kate	65
Moran, T. L.	134
Newson, Jno. J.	54
Packard, H. L.	245
Packard, T. J.	229
Phelps, O. B.	57
Pitney, F. R.	82
Prewett, Alpha	67
Prewett, E. J.	96
Prewett, H. J.	121
Prewett, N. E.	95
Prewett, S. J.	98
Prewett, W. J.	137
Purfurst, A. B.	74
Pullen, C. J.	80
Rader, A. L.	37
Rader, R. M.	37
Richardson, E. A.	139
Richardson, Fannie	111
Richardson, Geo.	122
Richardson, James	130
Richardson, Jessie, sr.	124
Richardson, Jessie, jr.	98
Richardson, S.	163
Rodgers, Warren	37
Roper, F.	182
Schofield, S. G.	34
Shafer, W. H.	40
Simon, S. S.	115
Smith, A. L.	58
Smith, I. M.	73
Smith, P.	71
Spencer, W. M.	56
Tevis, High	34
Tevis, W. S.	34
Tousley, C. L.	31
Wagy, J. J.	181
Wagy, M. S.	34
Williams, Elizabeth	48
Wrampelmeier, L. A.	73
Wrampelmeier, L. C.	73
Wrampelmeier, F. W.	73
Wrampelmeier, T. G.	73
Youle, W. E.	223
Young, C. S.	30
Zartman, G. W.	169
Zartman, M. E.	137

Total number of claimants..... 103
Total number of claims..... 8,248

STATE OF CALIFORNIA, *County of Los Angeles, ss:*

George B. Beebe and E. P. Houghton, each being duly sworn, deposes and says that the foregoing list, showing the names of 103 persons, with the number of petroleum placer claims located by each in Kern County, Cal., is a true and correct list of the placer claims located between the 2d of May, 1899, and the 1st day of March, 1900, as shown by the mining locations of record in the office of the county recorder of said county.

That in obtaining the data for the foregoing tabulated statement affiants transcribed from the official records of said Kern County the material portion of every petroleum placer mining location filed in the office of the county recorder of said county between the dates aforesaid, embracing the names of locators and description of property located, the dates of recording location, and the book and page of record.

That in said transcription affiants discovered and noted that a

very small percentage of such claims (less than 10 per cent) were made by single individuals in tracts of 20 acres or less each; but that at least 90 per cent of such claims were located by groups of eight persons in tracts of 160 acres each.

GEORGE B. BEEBE.
E. P. HOUGHTON.

Subscribed and sworn to before me this 31st day of March, 1900.

[SEAL.] H. S. G. MCCARTNEY,
Notary Public in and for the County of Los Angeles, State of California

FRESNO COUNTY OIL LOCATIONS.

The following tabulated statement from the official records of Fresno County show that in that county alone, between January 1, 1899, and March 1, 1900, ninety-seven persons have located 5,983 placer petroleum claims of 20 acres each, an average of over 60 claims, or 1,200 acres to the person, or a total of 119,660 acres.

In this list appears one person whose claims exceed 200; five persons whose claims number between 150 and 200; five persons whose claims number between 100 and 150; forty-two persons whose claims number between 50 and 100; forty-four persons whose claims number between 30 and 50.

Those holding less than 30 claims each are not shown on this list.

STATEMENT.

Names.	Number of locations.	Names.	Number of locations.
Aferitz, Geo. C.	35	Giffin, J. A.	46
Barieau, A.	250	Gorlick, Wm. H.	30
Barieau, F. E.	90	Grunig, Emil	74
Barieau, Mary A.	100	Grunig, C.	79
Barieau, M. J.	58	Grunig, George	50
Barieau, L. H.	33	Grunig, Eda	34
Bell, T. A.	48	Hamilton, James	39
Berg, George	31	Hamilton, Sidney	35
Bowles, P. E.	59	Harris, M. K.	37
Brown, E. T.	30	Haycroft, C. S.	141
Bunting, John A.	85	Hebbard, J. C. B.	62
Bunting, E. M.	78	Heggerty, Chas. J.	62
Bunting, F. O.	34	Hickok, N. A.	151
Bunting, J. N.	42	Hoxie, Geo. L.	76
Caldwell, A.	131	Hughes, J. E.	57
Canfield, C. A.	33	Hundig, R. V.	31
Chanslor, J. A.	31	Hundig, J. R.	31
Carlson, J. T.	30	Hutchinson, B. E.	146
Carpenter, L. G.	62	Hughes, W. M.	31
Crump, Frank	64	Inns, L. B.	52
Crump, V. H.	65	Jones, H. A.	62
Cutting, L. H.	50	Johnson, Fred L.	38
Daly, J. B.	79	Kelly, Frank S.	42
Daly, R. W.	37	Kerr, J. M.	87
Ewing, D. S.	161	Kerr, J. P.	37
Escot, Jos.	48	Lee, J. F.	61
Escot, Sarah E.	35	Leonard, D. A.	31
Ferguson, A. D.	32	Long, L. L.	72
Giffin, G. W.	37	Manley, J. S. (C.S.36)	150

Names.	Number of locations.
Miles, W. O.	152
Mitchell, Eva	48
Mitchell, S.	73
Muther, I. E.	31
McCreary, J. A.	52
McCreary, W. M.	50
McElroy, John C.	62
McKay, Scott	62
McKelvey, John	68
McNear, Fred W.	56
McNear, G. W.	85
McNear, G. W., jr.	56
Osgood, Fred	74
Osgood, Howard	68
Ripperdan, Thos. W.	111
Robinson, J. M.	30
Rosenthal, Belle	31
Rosenthal, Cerf	33
Rosenthal, Clara	32
Rosenthal, Flora	32
Rosenthal, M. S.	32
Shattuck, C. A.	150
Simmons, C. B.	51
Smith, G. W.	39
Spinks, C. C.	39
Spinks, Clara A.	36
Spinks, E. L.	36
Spinks, W. A.	36
Taylor, Chas. S.	41
Travers, J. W.	38
Valentine, A.	59
Valentine, E. S.	65
Waters, A. F.	57
Waters, Esther M.	57
Waters, S. A.	58
Wilcox, Chas. G.	91
Wilcox, Mrs. Fannie	73
Wilcox, Miss Mamie	42
Young, H. H.	42

RECAPITULATION.

Total number of claimants	97
Total number of claims located by them	5,983
Average for each claimant	60

STATE OF CALIFORNIA, *County of Los Angeles, ss:*

George B. Beebe, being duly sworn, deposes and says that he has carefully and accurately compiled the foregoing tabulated statement from eight index books furnished by the Fresno County Abstract Company, showing the names of all locators of petroleum placer claims, and the number of such claims, filed in the office of the recorder of Fresno County, Cal., between the 1st day of January, 1899, and the 1st day of March, 1900; and has selected from such books the foregoing 97 names as being the locators of the greatest number of petroleum placer claims in said county; and deponent further says that said tabulated statement is in all respects true and correct as shown by such records. Parties holding less than 30 claims are not shown on this statement.

GEORGE B. BEEBE.

Subscribed and sworn to before me this 31st day of March, 1900.
(Seal.)
H. S. G. MCCARTNEY,
Notary Public in and for the County of Los Angeles, State of California.

I hereby certify that I am personally acquainted with the parties to the foregoing affidavits, and know they are fully competent to perform the work which they state they have done, and that their statements are entitled to full credence and belief.

STEPHEN M. WHITE.

DIVISION II.

CONTAINING A COPY OF AFFIDAVIT OF M. A. BALLINGER ON FILE IN KERN OIL CO. V. CLARKE, 30 L. D. 550, BEFORE THE SECRETARY OF THE INTERIOR, WITH LETTER TO COMMISSIONER OF GENERAL LAND OFFICE AND THE ONLY AFFIDAVIT REQUIRED BY THE LAND OFFICE TO ACCOMPNY FOREST LIEU SELECTIONS.

(It will be noticed that even this affidavit—which contains no non-occupancy clause—was not required until long after these selections were made.)

DISTRICT OF COLUMBIA: SS.

I, M. A. Ballinger, upon my oath, say that about June, 1900, I called upon the Hon. Binger Hermann, Commissioner of the General Land Office, and asked him if he could supply me with the form of affidavits required by claimants in the selection of lieu lands under the Forest Reserve lieu land act of June 4, 1897. The Commissioner directed me to go to Division "P" and ask for same. I did so, and the form of affidavit, which is in typewriting and hereto attached, was handed to me by Mr. William E. Valk in response to my request for same. Today, I put said typewritten form in my pocket, and having written the letter to the Honorable Commissioner of the General Land Office, which is hereto attached, I went to the Commissioner personally, and handed to him such letter. He said that he would furnish me a form if they had one. He called a messenger and sent my letter to Division "R," requesting that if they had any copy of such form, either printed or typewritten, to send it to him. There was brought back to the Commissioner a letter book marked "Casey's Book, Forest Lieu Land Act, June 4, 1897," and on page 16, was found an affidavit exactly corresponding with the typewritten form hereto attached. At the top of such form in said letter book, there was written with a pen the following:

"Copies sent to all local offices, Mineral States, June 18, 1900."

This same language was thereupon written at the

top of the typewritten copy by the Private Secretary of the Commissioner of the General Land Office, and returned to me with my letter to the Commissioner. The Commissioner had partially examined the form found in the letter book and directed his secretary and myself to compare the two and see if they were copies and we found them to be so.

(Signed) M. A. BALLINGER.

Subscribed and sworn to before me this 16th day of April, A. D. 1901.

(Signed) L. P. SQUIER,
(Seal) *Notary Public.*

Washington, D. C.,
April 16, 1901.

The Honorable
Commissioner of the General Land Office,
Washington, D. C.

Dear Sir:

Will you please furnish me the form of affidavits now required by your Department to be filed with and made part of the selections under the Forest Lieu Land Act of June 4, 1897, and oblige,

Very truly yours,

(Signed) M. A. BALLINGER.

NON-MINERAL AFFIDAVIT.

Required in forest lieu selections, Act June 4, 1897, (30 Stat., 36), based upon perfected claims.

This affidavit can be sworn to only on personal knowledge, and cannot be made on information and belief.

UNITED STATES LAND OFFICE.

.....

.....

.....being duly sworn according to law, deposes and says that he is the identical .....who is an applicant for Government title to the.....

.....

.....that he is well acquainted with the character of said described land and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons, that said land is essentially non-mineral land, not within a mineral township nor within six miles of a mining claim, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and that his post office address is.....

.....

.....

I HEREBY CERTIFY that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by.....), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in..... ....., within the.....land district, on this.....day of.....1....

.....

NOTE—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

DIVISION III.

PETROLEUM IS NOT MINERAL, PETROLEUM LANDS ARE NOT RESERVED FROM PURCHASE OR ENTRY UNDER THE GENERAL LAWS.

THE ORIGIN AND NATURE OF PETROLEUM.

According to the prevailing scientific opinion petroleum is of organic origin—a product of the decomposition of fish and other aquatic animals.

All of the theories and opinions of the writers on the subject will be found collected and reviewed in Brannt's Petroleum, its History, Origin, Occurrence and Production. In view of the exhaustive treatment of the subject to be found there, it seems unnecessary to cite particular authorities here. We find, however, a recent article by the geologist of the State of Maryland on the reported discoveries of oil in this section, published in the Baltimore Sun, in which he states that the prevailing opinion as to the origin of petroleum is as we have stated above.

Originally, when its nature and origin were not so well understood, petroleum was known as "rock oil," and while it is yet popularly termed a mineral oil and has been so termed by some of the courts—even the Supreme Court of the United States—in cases where its classification as a substance or the application of the public land laws was not involved, it is apparent that such terminology has been used, for want of a better descriptive term, to distinguish it from the artificial oils popularly classed as animal and vegetable.

That the term mineral is not used as signifying *inorganic* origin is apparent from its use in scientific works where, at the same time, petroleum is said to be of *organic* origin. See, for instance, Fowne's Manual of Elementary Chemistry (1862) pages 540-541, where will be found a treatment of the subject in the light of the then existing knowledge of the substance.

PETROLEUM BELONGS IN THE SAME CATEGORY AS WATER.

The Supreme Court in Ohio Oil Company v. Indiana, 177 U. S. 190, has demonstrated the wide and unabridgeable distinction between liquid substances, irrespective of their chemical or physical classification, and the mineral substances contemplated by the mining laws and the reservation of minerals from sale or entry under the other land laws. The opinion of the Court is too lengthy to make satisfactory quotation within the limits of this brief; but an examination of the case will show that the Court places oil in the same category as water and holds that it is governed by the rules of law applying to water and not by the principles applicable to other mineral deposits and that (syllabus):

> "The owner of the surface has no property right in the gas or oil until he has actually reduced it to possession, or if he has any property right therein, it is a right in common with the co-equal right of other land owners to take from the common source of supply."

And in the previous case of Brown v. Spilman [155 U. S. 665], it was said:

> "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal and other minerals *which have a fixed situs* cannot be applied to contracts concerning them without some qualifications."

Congress would have a perfect right to provide that "*lands chiefly valuable for artesian water may be acquired under the provisions of the placer mining laws*," yet this would be a mere privilege extended, which did not before exist; it would in no wise exclude such lands from acquisition under the non-mineral land laws, although correctly speaking water is a mineral in a truer sense than petroleum.

LANDS VALUABLE FOR PETROLEUM ARE NOT MINERAL LANDS.

The reservations of mineral lands in the public land laws were made before the discovery of petroleum deposits in this country, and if there is one thing clear from the letter and policy of the national mining laws it is that the substances contemplated there are such as have a fixed *situs* and a review of the legislation upon the subject will show that the substances contemplated by Congress as included within the term mineral (with the exception of coal, which is elsewhere specifically mentioned), are the metals and especially the precious metals.

A full history of the subject will be found in The Public Domain, 1883, pp. 306-331.

Up to 1848 copper, lead and iron were the only minerals which were contemplated by the reservations in the several laws, although gold and silver had been, through abundance of caution, reserved in the ordinance of 1785.

In 1850 the Attorney General held that public lands containing *iron ore merely* were not *mineral* within the act of 1847 for the sale of "copper, lead or *other valuable ores*" in the Lake Superior district, but were to be disposed of under the other laws.

In Mullan v. U. S., 118 U. S. 271, the Court recognized that it was doubtful if *coal* was *mineral* within the meaning of the reservation in the pre-emption act of 1841 and only resolved that doubt by the aid of a subsequent statute expressly declaring coal to be so reserved. They say:

> "The case, therefore, turns on the question whether coal lands are mineral lands within the meaning of that term as used in the statute regulating the disposition of the public domain.
>
> "The first statute which made any reference to minerals on the public lands was that of September 4, 1841, 5 Stat. at L. 453, Chap. 16, Sec. 10, which provided that no pre-emption entry should be made on lands on which are situated any known salines or mines; and by the act of July

1, 1864, 13 Stat. at L. 343, Chap. 205, Sec. 1, it was provided that, '*Any tracts embracing coal beds or coal fields* constituting portions of the public domain, *and which as 'mines are excluded from the pre-emption act of* 1841, *and which, under past legislation, are not liable to ordinary private entry,*' might be disposed of at a price not less than twenty dollars an acre. This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. *Whatever doubt there may be as to the effect of this declaration on past transactions*, it is clear that after it was made coal lands were to be treated as mineral lands."

The discovery of gold in California and the rush of miners into that section induced the passage of the act of 1866 countenancing and regulating mining upon the public domain for individual profit and permitting entry and patenting of lode claims, followed by the act of 1872 amending the act of 1866 so as to permit the entry and patenting of placer claims, and the act of 1872 amending the previous acts. As incorporated in the Revised Statutes, the previous laws are found in Secs. 2318 *et seq.*:

R. S. 2318 reserves from sale, except as otherwise expressly directed by law, all lands valuable for *minerals.*

By R. S. 2319, "all valuable mineral deposits in lands belonging to the United States," are declared open to exploration and purchase.

R. S. 2320 regulates mining claims upon "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits."

And R. S. 2329 provides for the entry and patenting of "claims usually called 'placers,' including all forms of deposit excepting veins of quartz or other rock in place."

In view of the familiar rule of interpretation limiting general terms to intend things of the same kind

as those particularized, and especially in view of the opinion of the Attorney General, *supra*, it must be presumed that the general term "other valuable deposits," intends substances of the same mineral character as the particular substances specified, viz., gold, silver, cinnabar, lead, tin and copper.

And the term mineral being thus limited to metallic ores (with the addition of coal by express statute) we have a safe and certain classification.

None of the Federal courts have been called upon to determine the meaning and scope of the terms "valuable mineral deposits," "other valuable deposits," or "claims usually called placers including all forms of deposit." But the Supreme Court has, in two cases, defined lode and placer claims in language that leaves no room for doubt as to the understanding of that court with respect to the meaning of the terms "mineral," or "other valuable deposits."

In Reynolds v. Mining Co., 116 U. S. 687, they say:

> "These varying provisions of the act of Congress as regards the two classes of mineral deposits and their surroundings are founded on the well known differences in their character. The veins, lodes or fissures mentioned in section 2320 are found in the surrounding rock, and are described and defined in the case of Iron Silver Co. v. Cheesman, recently decided in this court. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath. The one is only made available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface, and subjecting it to crushing, melting and other processes by which the precious metal is separated from the ore of which it is a part. In the other, the more usual way is to take the soft earthy matter in which particles of mineral are loosely mingled and by filtration separate the one from

the other. It is very clear that Congress considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit; and it accordingly, when a patent was asked, fixed the price of the former at $5, and of the latter at $2.50 per acre, as represented by the superficial area of the survey."

And in United States v. Silver Mining Co., 128 U. S. 679, they say:

"By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is not fixed in rock, but which are in a loose state and may, in most cases, be collected by washing or amalgamation without milling.

"By 'veins or lodes,' as here used, are meant lines or aggregations of metal imbedded in quartz or other rock in place. The terms are found together in the statute, and both are intended to indicate the presence of *metal* in rock. * * * In Iron Silver Mining Company v. Cheesman, 116 U. S. 533, a definition of a lode is given, so far as it is practicable to define it with accuracy, and it is not necessary to repeat it."

And an examination of the many decisions of the Supreme Court, particularly the opinions of Mr. Justice Field, the great mentor of the mineral law, will show that in speaking of the minerals contemplated by the public land laws they habitually use the term "precious metals."

See—

Buford v. Houtz, 133 U. S. 320.
Forbes v. Gracey, 94 U. S. 762.
Mining Co. v. Mining Co., 143 U. S. 394.
Jennison v. Kirk, 98 U. S. 457.
Erhardt v. Boaro, 113 U. S. 527.
Iron Silver Mining Co. v. Cheesman, 116 U. S. 529.
Sullivan v. Mining Co., 143 U. S. 434.

ON AUGUST 27, 1896, SECRETARY SMITH, IN A WELL-CONSIDERED DECISION IN THE CASE OF THE UNION OIL COMPANY (23 L. D. 222), HELD THAT PETROLEUM IS NOT A MINERAL WITHIN THE MEANING OF THE LAND LAWS.

The next year Congress passed the act of February 11, 1897 (29 Stat. 526), entitled:

> "An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States."

And providing—

> "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage hereof."

And thereupon the Land Department issued a circular under this act (24 L. D. 183, 184), in which it said:

> "It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.

> "Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are by said act expressly confirmed, but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws."

The act of 1897 is a legislative recognition that petroleum is not mineral within the meaning of the land laws.

As we have shown, this was the understanding of the land department at the time of its passage and as said by the Supreme Court in Midway Co. v. Eaton (183 U. S. 602):

> "It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning. *One of the reasons is that the Land Department may have recommended the statute—indeed may have written its words*, or at any rate, were familiar with the circumstances which induced the legislation."

It is to be observed that in the act of 1897 there is no reservation of petroleum lands from entry under the general laws, and, as the Land Department properly held this act merely provided an additional method of acquiring title to petroleum lands, the reason of which is apparent when it is remembered that when the act was passed, the homestead law was the only general law by which title to non-mineral land could be acquired, and that law required residence and cultivation for five years, and limited a person to one entry.

When it is remembered that the price of placer ground is only $2.50 per acre, while no price is put upon the non-mineral lands of the public domain, and

scrip which can be located upon such land sells for $4 or $8 per acre, it is apparent that there could be no public policy demanding the reservation of petroleum lands from settlement or from the operation of the forest reserve land exchange act of June 4, 1897, and that the Government, in exchanging even known petroleum lands at $2.50 per acre for land in its forest reserves of much greater value, would be striking a good bargain.

We might also refer to the act of March 3, 1891 (26 Stat. 1095), where, in legislating for Alaska, it is provided, in section 14, that the two preceding sections shall not be construed to warrant the sale of lands which shall contain "coal or the precious metals," and, in section 15, that townsite entries shall not carry title to any vein of gold, silver, cinnabar, copper or lead.

And the act of May 14, 1898 (30 Stat. 409, Sec. 2), which provided that nothing in that act should be construed to give the railroad company the ownership or use of "minerals, including coal," and in section 10 used the term "mineral or coal lands."

And the act of July 1, 1898 (30 Stat. 620), used the expression "not mineral or reserved *and* not valuable for stone, iron or coal."

THE RULINGS OF THE PRESENT ADMINISTRATION OF THE LAND DEPARTMENT.

In view of all these considerations, we submit that the rulings of the present administration of the Land Department attempting to reverse the contemporaneous departmental interpretation of the acts of 1897 and adopting the formula that mineral includes every substance which may make land more valuable for its extraction than for agricultural purposes, and holding that the act of 1897 is a legislative declaration that petroleum is mineral within the meaning of the mining laws, are manifestly strained constructions of the several laws, unwarranted by their terms and by the spirit and intent of their enactment. Even the present administration has found its attempted criterion of min-

eral character too broad and far-reaching to suit itself, and has felt compelled in King v. Bradford (31 L. D. 108; Oct 10, 1901), to hold that lands containing deposits of ordinary brick clay are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes; thus demolishing its own formula and demonstrating the absurdity of venturing beyond the safe rule of limiting mineral, as plainly intended by the statutes, to include the ores or metals and coal, obtained by mining in the proper sense.